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90-1006

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

DONALD BERGER, BARBARA DALLAS, WILLIAM KIER, JR., ROSE SAXMAN and ROBERT WAGNER,

Petitioners,

vs.

EDGEWATER STEEL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

I. Whether an employer under its pension plan's mutual interest provision breached the plan's contractual terms in violation of ERISA when it adopted a blanket denial policy with respect to requests for 70/80 retirement benefits without allowing for individualized consideration and without amending the Plan in writing?

II. Whether a pension plan's mutual interest provision can legally be taken from the purview of fiduciary duty obligations?

III. Whether an employer's secret and vague severance pay plan in violation of ERISA's procedural and administrative requirements is grounds for a substantive remedy and/or is a violation of fiduciary duties?

Parties

The parties to the proceeding in the court below were: Donald Berger, Barbara Dallas, William Kier, Jr., Rose Saxman, and Robert Wagner and Edgewater Steel Company.

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IN THE

Supreme Court of the United States

October Term, 1990

No. _____

DONALD BERGER, BARBARA DALLAS,
WILLIAM KIER, JR., ROSE SAXMAN
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Petitioners,

v.

EDGEWATER STEEL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Donald Berger, Barbara Dallas, William Kier, Jr., Rose Saxman, and Robert Wagner, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 15, 1990.

Opinions Below

The reported opinion of the Court of Appeals, is reported in 911 F.2d 911 (3rd. Cir. 1990) and appears in the Appendix at 3a to 40a. The unreported opinion dated July 25, 1989, of the United States District Court for the Western District of Pennsylvania is reproduced in the Appendix at 41a to 56a. The District Court's unreported June 13, 1989, memorandum opinion is reproduced in the Appendix at 57a to 78a. The District Court's unreported February 11, 1988, memorandum opinion is reproduced in the Appendix at 79a to 87a.

Jurisdictional Statement

The judgment of the Court of Appeals was entered on August 27, 1990. The Honorable Dolores Sloviter filed a dissenting Opinion. A Petition for Rehearing was denied by the Court of Appeals on September 24, 1990. Judge Sloviter would grant a rehearing. Jurisdiction of this Court is proper under 28 U.S.C. §1254 (1).

Statutes Involved

29 U.S.C. 1102, Section 402 (a)(1) of the Employment Retirement Income Security Act ("ERISA") provides in pertinent part:

> "every employee benefit plan shall be maintained pursuant to a written instrument."

29 U.S.C. 1104, Section 404 (a)(1) of the Employment Retirement Income Security Act ("ERISA") provides in pertinent part:

> "[A] pesron is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."

29 U.S.C. Section 411 (d)(6) of the Internal Revenue Code provides that a pension plan that permits employer discretion to deny the availability of Section 411 (d)(6) protected benefit violates the definitely determinable requirement of Section 401 (a).

Statement

The Petitioners, Donald Berger, Barbara Dallas, William Kier, Jr., Rose Saxman and Robert Wagner, five long-term employees of the Edgewater Steel Company, alleged that they were compelled to retire from Edgewater Steel Company (Edgewater) on January 31, 1987.

Edgewater had an ERISA-qualified defined benefit plan entitled a "Noncontributory Pension Plan for Salaried Employees" (App. at 6a). Edgewater's managment decided to eliminate two benefits from the Plan: (1) the Special Payment portion of its pension benefits; and (2) a 70/80 retirement, which was an early retirement benefit, which also included a $330 per month supplement (App. at 6a). The 70/80 retirement was more valuable monetarily to the Petitoners than the $330 monthly supplement.

Section 2.6 (c) of the Plan provided that an employee could receive 70/80 retirement if the employee's retirement is in the mutual interest of the employee and the Company and is approved by the Company under mutually satisfactory conditions (App. at 7a). All of the Petitioners, except Rose Saxman, were eligible for 70/80 retirement by virtue of satisfying the age and service requirements under §2.6 (c) of the Plan (App. at 9a).

As presented in the summary plan description, when an employee retires from Edgewater and is eligible for pension benefits, those benefits are paid out in two segments: (1) Special Payment—for the first three months of the pension, the retiree is entitled to a lump sum equal to 13 weeks of vacation pay (14 weeks of vacation pay for those employees who retire after January 1, 1981, with 25 or more years of continuous service), with certain restrictions; (2) Regular

Pension—monthly payment commencing after the Special Payment period; the Regular Pension is equal to the higher of the percent pension or the minimum pension, subject to adjustments and a "pension cap". All of the Plaintiffs had qualified for the "Special Payment" (App. at 6a, 7a).

In a letter on Edgewater's stationery dated January 15, 1987, signed by its President, John H. Kirkwood, and addressed to all salaried employes, he announced, among other items, that the defined benefit plan was being frozen and replaced by a defined contribution plan and that the Special Payment would not be part of the Plan as of February 1, 1987 (App. at 8a). In addition, the plan fiduciaries subsequently amnounced that the 70/80 Pension together with the $330.00 supplement would also be eliminated (App. at 8a).

As a result of the elimination of the Special Payment, the five employees in question "resigned" their positions with Edgewater prior to February 1, 1987, in order to be eligible for the Special Payment to which they had previously qualified (App. at 26a).

Finally, four of the Petitioners were denied 70/80 pension benefits as well as $330.00 supplements at their retirements by Joseph Rosati, Manager of Industrial and Relations, and George Kutzmark, Executive Vice President and Chief Operating Officer, although they had qualified for them by virtue of their ages and length of service. Rosati and Kutzmark, who were fiduciaries of the plan, indicated unequivocally that Edgewater would not make these early retirement benefits available to any employees, including the Appellants (App. at 9a). Although this blanket denial policy effected all of the employees of Edgewater including the Petitioners, the

named fiduciaries admitted that the Plan had not been formally amended when they informed the Plaintiffs orally that no 70/80 Pensions were available (App. at 18a, 19a).

Petitioner Berger was informed by Rosati that the 70/80 was not available (App. at 44a). Petitioner Dallas was told by Rosati that Kutzmark had denied her request for the 70/80 (App. at 43a). Finally, Petitioner Wagner was told unequivocally by Kutzmark that Edgewater was not giving any 70/80's out (App. at 43a) Petitioner Kier said that he was also told that the foregoing benefits were not available to anybody (App. at 46a).

Edgewater also had, as evidenced by a single page in its personnel policy documents, a "Salary Termination Pay Policy", revised 7/15/82 (App. at 8a). The statement of the policy contains no conditions as to the eligibility beyond the clearly implied condition that the employee's salary be terminated. The statement consists solely of a "Severance Allowance" schedule, with the maximum payment set at 12 weeks' pay for 15 years or more of service. The existence of the plan had never been publicized or distributed to employees of Defendant at the time of the Plaintiffs' forced retirements (App. at 8a). The policy provided for no claims procedures, and no payment under its terms has ever been received by any of the five employees in question (App. at 21a).

The Proceedings Below

On October 22, 1987, Petitioners filed a Complaint against Edgewater in the United States District Court for the Western District of Pennsylvania. They alleged in their Complaint that in violation of "ERISA", they were forced to retire in order to receive a Special Payment, to which they were entitled, and that Edgewater wrongfully refused to afford them 70/80 retirement pensions, severance pay, and lost wages, as a result of being forced to retire. Petitioners also alleged two counts in misrepresentation. Respondent subsequently filed a Motion to Dismiss the Complaint on February 11, 1988, and as a result, the Lower Court dismissed the Counts of the Complaint alleging misrepresentation on the part of Defendants. However, the District Court held that the Special Payment was an "accrued benefit", and therefore did not dismiss the ERISA allegations.

At the close of discovery, both parties filed motions for summary judgment. On June 13, 1989, the District Court (per Mencer, *J.*) granted in part and denied in part both parties motions. Judgment was entered in favor of Petitioner, Donald Berger, for a 70/80 pension benefit and the $330.00 supplement. Judgment was entered for the Defendant on the other Counts of the Complaint. On June 20, 1989, Petitioners filed a Motion to Alter or Amend the June 13, 1989, Judgment of the District Court pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure, and Edgewater filed a Motion for Reconsideration on June 26, 1989. On July 25, 1989, the District Court (per Mencer, *J.*), granted the Motion to Alter or Amend the Judgment which provided that Petitioners, Barbara Dallas and Robert Wagner be entitled to the 70/80 early retirement benefits and the $330.00 supplements as well. However, the Lower Court

denied the foregoing benefits to Petitioner, William Kier, Jr. because he had allegedly failed to exhaust his administrative remedies. The District Court denied Edgewater's Motion for Reconsideration.

Notice of Appeal was filed by Edgewater on July 7, 1989. Petitioners then filed a Cross Appeal on July 11, 1989. After the Order of July 25, 1989, by the District Court, Edgewater filed a further appeal on August 17, 1989, and Plaintiffs then filed another Cross Appeal on August 23, 1989.

The Third Circuit sustained the summary judgments granted to Edgewater. However, it reversed the District Court's orders in favor of Petitioners, Berger, Dallas and Wagner, which had awarded them 70/80 retirements and the $330.00 per month, supplements, and instructed the District Court to enter a judgment against Petitioners on all counts of the Complaint.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with statutory authority and principles established by this Court.

This case presents three critically important issues of statutory law under ERISA. Firstly, whether an employer can adopt a blanket denial policy based upon a mutual interest provision with respect to payments from its pension plan without affording employees individualized consideration and without amending the plan in writing. Secondly, whether an employer's mutual interest provision of its pension plan can legally be taken from the purview of fiduciary duty obligations. Thirdly, whether an employer can maintain a self admitted secret severance pay plan in violation of procedural and administrative requirements of ERISA, to the detriment of its employees. The Third Circuit in the case at bar has held that an employer can do all of the foregoing.

In addition, on a factual level, another issue of importance is whether the Third Circuit committed a clear error in stating as follows:

> "There is no evidence on this record showing that Edgewater's desire to retain these employees was motivated by any bad faith, with respect to their individual entitlement under the Plan or otherwise." (App. at 19a).

Petitioners argue that in light of the District Court's awarding a summary judgment for the three plaintiffs on that issue, and Judge Sloviter's statement that it is at least a jury question, there was clear error on the part of the Third Circuit and therefore the judgment should be vacated.

A. The Decision Below Approving An Oral Blanket Denial Policy In Effect Was A *De Facto* Plan Amendment In Violation Of 29 U.S.C. §1102, Section 402(a)(1) of ERISA.

The Third Circuit stated as follows (App. at 17a):

> "Although Edgewater's blanket denial of requests for 70/80 retirement could be seen as an amendment to the Plan, the instant provision still would not apply because none of the Employees met the requirements for 70/80 retirement prior to the time the blanket denial policy was instituted. All of the Employees left Edgewater Steel before meeting the requirements for 70/80 retirement."

The foregoing conclusion was based upon an erroneous grasp of the facts. All of the employees *had met* the age and service requirements for a 70/80 retirement *prior* to the time the blanket policy was initiated. In addition there also appears to be confusion regarding the requested relief. The Third Circuit erroneously stated as follows (App. at 16a):

> "None received the $330 per month supplement associated with 70/80 retirement or severance pay."

That is only partially true because the Petitioners did not recieve a 70/80 retirement as well which was worth considerably more than the $330 month supplement. For instance, the District Court granted the Petitioners both 70/80 early retirement benefits and the $330 per month supplements. As Judge Sloviter so aptly stated in her dissent (App. at 34a):

> "Exercising the appropriate de novo standard I believe *it is clear* that the Company's pension plan evidences an undertaking by the Company, as an employer, to give an employee who sought to retire under the 70/80 program and who met the age and service requirements an *individualized determination* as to whether the particular retirement would be in

> the interest of the Company. The majority acknowledges that the employer did not do so in this case." (emphasis supplied).

Since the employees all met the age and service requirements to qualify for 70/80 retirements under the Plan, Respondent's unwritten blanket denial policy was a *de facto* plan amendment in violation of Section 402 (a)(1) of ERISA. Therefore, the Third Circuit was in error in approving this blanket denial policy.

B. The Decision Below Approving An Oral Blanket Denial Policy Was A *De Facto* Plan Amendment In Conflict With Internal Revenue Code, 29 U.S.C. §411 (d)(6).

Section 411 (d)(6) of the Internal Revenue Code, 29 U.S.C. Section 411 (d))6) is the tax counterpart of ERISA §204 (g), 29 U.S.C. §1054 (g), and the Internal Revenue Service has regulatory authority over both sections. Under Section 411 (d)(6), a plan may not be amended to add employer discretion to a protected benefit plan that has already accrued. The Third Circuit stated that Section 204 (g) of ERISA prohibits an employer from decreasing a participant's accrued benefit by amending a pension plan.

Since the Petitioners' benefit had accrued, the Respondent's blanket, denial policy is clearly in conflict with the above Internal Revenue Regulations.

C. The Decision Below Was In Clear Error When It Stated That There Is No Basis On This Record To Show That Respondent Acted In Bad Faith In View Of Both The District Court's Opinion And Judge Sloviter's Dissent.

The District Court held that it may have been in the parties mutual interest that the Plaintiffs retire (App. at 53a). The District Court further held that both fiduciaries of the Plan, Rosati and Kutzmark, exercised an improper motive, therefore breaching their fiduciary duties as plan administrators (App. at 54a).

Judge Sloviter in her dissent stated that a reasonable fact finder would be entitled to treat skeptically the testimony of the fiduciaries (App. at 36a). She concluded that there is a genuine issue for trial which precluded the majority's imposition of a summary judgment (App. at 39a).

Furthermore, the District Court when it granted summary judgments to three of the Petitioners was also skeptical of the employer's blanket denial policy, and did not necessarily believe the testimony of the fiduciaries when it stated:

> "We find that it may have been in the mutual interest of the parties that the Plaintiffs retire." (App. at 54a).

The District Court further stated:

> "Regardless of whether mutual interest, we find that Mr. Rosati and Mr. Kutzmark failed to comply with ERISA's disclosure requirements, failed to apply the terms of the plan, and denied benefits solely to cut the costs of the company . . . Mr. Rosati and Mr. Kutzmark denied benefits arbitrarily and capriciously and exercised an improper motive, therefore breaching their fiduciary duties as plan administrators." (App. at 54a).

Based upon the decision of the District Court and Judge Sloviter's strong dissent, the decision of the Third Circuit in failing to permit this issue to go to trial by granting a summary judgment, was an abuse of its discretion.

Curiously, in *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279 (3rd Cir. 1988) cited by the Third Circuit in arriving at its decision, with regard to 70/80 Pensions, Judge Becker states as follows:

> "However, I would hold that in future case, the plan administrator is required to articulate specific reasons in any communication denying benefits under an early retirement provision like 2.6 (d)."

In a footnote 3, Judge Becker also cautioned in *Hlinka* at 22:

> "I note in this regard that I am troubled by the majority's discussion in part III. In my view, in the absence of a statement of a specific reasons for denial of benefits, a genuine issue of material fact will likely exist as to whether full and fair review was provided. *I believe that in such situations in the future*, the district court should deny a motion for summary judgment and should allow the plaintiff to proceed with discovery." (emphasis supplied)

Therefore, based upon the foregoing conclusions by both the District Court, Judge Sloviter and Judge Becker, the order of the Third Circuit is clearly in error and should be vacated.

D. The Decision Below Contravenes This Court's Recognition Of Fiduciary Duty Obligations On The Part Of A Plan Administrator.

The Third Circuit reasoned that Edgewater did not breach its fiduciary duty under ERISA as follows (App. at 17a):

> "only the employer determines whether an employee's retirement is in the Company's best interest."

The Third Circuit's reasoning based upon a prior case, *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279 (3rd Cir. 1988), is faulty at best. For instance the 70/80 retirement is no different than any other early retirements which are subject to a fiduciary duty standard. A cursory review of ERISA indicates that any eligibility decision is subject to fiduciary rules.

In essence, the mutual 70/80 interest provision incorporated in §206 (c) of Edgewater's pension plan is the equivalent of authorizing breaches of fiduciary duties. Any discretionary decision must be subject to fiduciary duties, *Firestone Tire and Rubber Co. v. Bruch*, 109 S.Ct. 948 (1989).

Therefore, Petitioners argue that a mutual benefit provision of a pension plan is questionable at best. If, however, a mutual interest provision is deemed to be valid, a fiduciary standard ought to be applied. Finally, Petitioners argue that a mutual interest provision is comparable to an illegal exculpatory clause which appears in various contracts of adhesion for the simple reason the employer can always say that it wasn't in its best interest when an employee retires although the contrary may be true. Therefore, an employer could make an illustory promise and incur no obligations under a mutual interest provision because it is not subject to fiduciary standards by virtue of the Third Circuit's decision, and therefore has absolute veto power over any request.

II. The decision below conflicts with decisions of other Courts of Appeals concerning the validity of oral amendments of pension plans.

In *Hozier v. Midwest Fasteners Inc.*, 908 F.2d 1155 (3rd Cir. 1990), the Third Circuit held that Section 402 (a)(1) of ERISA requiring that benefit plans be maintained pursuant to a written instrument, precluded oral modifications which either increase or decrease benefits. Judge Sloviter stated that under the *Hozier* holding (App. at 36a):

> "the plaintiffs are entitled to consideration of their applications for 70/80 retirement under the pre-amendment terms of the Edgewater plan, which in this case requires an individualized consideration of whether it was in the 'interest' of the Company to permit the three employees in question to retire with 70/80 benefits under Section 2.6 (c) of the Plan."

In the case at bar, the majority did not deny that Respondent effectively amended the pension plan to eliminate individualized consideration of the employees applications for 70/80 retirement. Therefore, there is no dispute that the plan was modified by a *de facto* amendment. It is undisputed that, the oral amendment purported to decrease benefits. The *Hozier* Court with regard to the foregoing stated at Page 1163 as follows:

> "Indeed, to the extent that ERISA is primarily concerned with promoting the interest of employees and their beneficiaries. *Shaw v. Delta Airlines.*
>
> . . . the argument for disallowing oral amendments, at least as a policy matter is even more compelling when such amendments purport to decrease benefits."

Section 402 (a)(1) of ERISA requires that "every employee benefit plan shall be established and maintained pursuant to a written instrument", 29 U.S.C. §1102. Therefore, various circuits have invalidated oral amendments when employers have proposed them.

For instance, *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986), held that "*ERISA precludes oral modifications of employee benefit plans.*" Since *Nachwalter* the following five circuits have followed *Nachwalter*—citing from *Hozier, supra*, See *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120 (4th Cir. 1989) (stating that "informal" or "unauthorized" modification of pension plans is "impermissible" under ERISA); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) ("ERISA mandates that a plan itself and any changes made to it are to be in writing"); *Musto v. American General Corp.*, 861 F.2d 897, 910 (6th Cir. 1988) ("[A] written employee benefit plan may not be modified or superceded by oral undertakings on the part of the employer.") cert. denied, _____ U.S. _____, 109 S.Ct. 1745, 104 L.Ed.2d 182 (1989); *Moore v. Metropolitan Life Insurance Co.*, 856 F.2d 488, 492 (2d Cir. 1988) ("[A]n ERISA welfare plan is not subject to amendment as a result of informal communications between the employer and plan beneficiaries.")

Since all of the foregoing cases denied the employee's right to rely on an employer's proposed modification to increase benefits, it stands to reason that the converse to decrease payments would not be allowed as well. As the *Hozier* Court stated, Section 402 (a)(1) of ERISA draws no distinction between oral promises to increase or decrease benefits.

III. The decision below allowing a secret, vague written severance pay plan which the respondent concedes violated ERISA's procedural and administrative requirements rises to a level that the substantive relationship between an employer and employee as well as its fiduciary duties are altered.

The Edgewater severance pay plan was a one page payment schedule without any conditions except for the fact of termination itself. Under its terms, the plan was in effect a separation bonus for anyone who left the company regardless of the reason. Therefore, it is doubtful that any conditions could be read into the plan.

The Third Circuit acknowledged that Respondent violated ERISA's procedural requirements by failing to describe or distribute its severance pay policy to its employees, and by failing to provide for a claims procedure (App. at 21a). However, the Third Circuit concluded that the Edgewater secret severance policy with its attendant procedure violations and its administration procedures did not rise to the level of violations in *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert denied*, 106 S.Ct. 183 (1985) (App. at 22a).

Petitioners claim that the Third Circuit in rejecting the reasoning that substantive remedies such as severance pay are not available for violations of ERISA is in conflict with the Ninth Circuit, and with the fundamental purpose of ERISA to protect the benefits of employees. Therefore, a substantive remedy should have been allowed.

Indeed, the Third Circuit acknowledged that the severance plan was vague (App. at 21a) and cryptic (App. at 22a). Notwithstanding, it surprisingly stated as follows (App. at 21a):

> "By virtue of its vagueness, it gave the fiduciary discretionary authority to determine eligibility for benefits."

If vague and cryptic terms by themselves are sufficient to provide the administrator with discretionary authority to interpret a severance pay plan, it would be in contradiction to the *Bruch* standard. Finally, the past practice of the employer was a disputed question of fact that should not have been subject to a summary judgment (App. at 22a).

Conclusion

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: December 21, 1990

APPENDIX

Sur Petition for Rehearing of the, United States Court of Appeals for the Third Circuit Dated September 24, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-3465, 3501, 3570 & 3596

DONALD BERGER, BARBARA DALLAS, WILLIAM KIER, JR., ROSE SAXMAN and ROBERT WAGNER,

v.

EDGEWATER STEEL COMPANY, a subsidiary of Edgewater Corporation, EDGEWATER CORPORATION, EDGEWATER STEEL COMPANY, as Plan Administrator of the Non-Contributory Pension Plan for Salaried Emplcyees, and JOHN H. KIRKWOOD, an individual,

EDGEWATER STEEL COMPANY and EDGEWATER CORPORATION,
Appellants at Nos. 89-3465 & 89-3570.

DONALD BERGER, BARBARA DALLAS, WILLIAM KIER, JR., ROSE SAXMAN and ROBERT WAGNER,
Appellants at Nos. 89-501 & 89-3596.

v.

EDGEWATER STEEL COMPANY, a subsidiary of Edgewater Corporation, EDGEWATER CORPORATION, EDGEWATER STEEL COMPANY, as Plan Administrator of the Non-Contributory Pension Plan for Salaried Employees, and JOHN H. KIRKWOOD, an individual.

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 87-02250).

SUR PETITION FOR REHEARING

PRESENT: HIGGINBOTHAM, *Chief Judge*, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD and ALITO, *Circuit Judges*.

The petition for rehearing filed by appellants Donald Berger, Barbara Dallas, William Kier, Jr., Rose Saxman and Robert Wagner in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

Judge Sloviter would grant rehearing.

By the Court,

WILLIAM D. HUTCHINSON
Circuit Judge

DATED: SEP 24 1990

Opinion of the United States Court of Appeals for the Third Circuit Dated August 15, 1990

Filed August 15, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-3465, 3501, 3570 & 3596

DONALD BERGER, BARBARA DALLAS, WILLIAM KIER, JR., ROSE SAXMAN and ROBERT WAGNER

v.

EDGEWATER STEEL COMPANY, a subsidiary of Edgewater Corporation, EDGEWATER CORPORATION, EDGEWATER STEEL COMPANY, as Plan Administrator of the Non-Contributory Pension Plan for Salaried Employees, and JOHN H. KIRKWOOD, an individual

EDGEWATER STEEL COMPANY and EDGEWATER CORPORATION,
Appellants at Nos. 89-3465 & 89-3570

DONALD BERGER, BARBARA DALLAS, WILLIAM KIER, JR., ROSE SAXMAN and ROBERT WAGNER,
Appellants at Nos. 89-3501 & 89-3596

v.

EDGEWATER STEEL COMPANY, a subsidiary of Edgewater Corporation, EDGEWATER CORPORATION, EDGEWATER STEEL COMPANY, as Plan Administrator of the Non-Contributory Pension Plan for Salaried Employees, and JOHN H. KIRKWOOD, an individual

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Appeal from the United States District
Court for the Western District of Pennsylvania
(D.C. Civil Action No. 87-02250)

Argued: January 23, 1990

PRESENT: SLOVITER, HUTCHINSON and
COWEN, *Circuit Judges*

(Opinion filed August 15, 1990)

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Wagner

OPINION OF THE COURT

HUTCHINSON, *Circuit Judge*.

Five former employees (collectively "the Employees") of Edgewater Steel Company

(Edgewater Steel) appeal an order of the United States District Court for the Western District of Pennsylvania granting summary judgment in favor of Edgewater Steel, Edgewater Corporation and John H. Kirkwood (Kirkwood)[1] on all but one claim in the Employees' complaint brought under the Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. §§ 1001-1371 (West 1985 & Supp. 1990). The Employees also appeal the district court's dismissal of their state law misrepresentation claims and its denial of their motion for leave to amend the complaint and their motion to compel the production of documents. Edgewater Steel and the other defendants (collectively "Edgewater") have cross-appealed the district court's entry of summary judgment in favor of three of the employees, Donald Berger (Berger), Barbara Dallas (Dallas) and Robert Wagner (Wagner). The district court awarded early retirement benefits to these three employees based on its holding that Edgewater violated ERISA.

For the following reasons, we will reverse the district court's order granting summary judgment in favor of Berger, Dallas and Wagner. We will remand the case to the district court with instructions to enter judgment in favor of Edgewater on all counts of the complaint.

I.

In October, 1986, Kirkwood purchased Edgewater Steel from the Hillman Corporation. At the time, Edgewater Steel was in serious financial difficulty. After his purchase of the company, Kirkwood installed a new management team. The team included George Kutzmark (Kutzmark) and

1. Edgewater Steel is a subsidiary of Edgewater Corporation. Kirkwood is the president of Edgewater Steel.

Joseph Rosati (Rosati). Kutzmark was Executive Vice President and Chief Operating Officer; Rosati was Manager of Industrial Relations.

To cut costs, Edgewater Steel decided to eliminate certain benefits under its Noncontributory Pension Plan for Salaried Employees (the Plan). At the same time, Edgewater Steel initiated a reduction in force. None of the Employees who brought this action was to be part of this reduction in force, and none of their positions was to be eliminated.

The Plan is a defined benefit, single employer, qualified plan, subject to the vesting, funding and participation requirements of the Internal Revenue Code and ERISA. Edgewater Steel management decided to eliminate two benefits from the Plan: (1) the "special payment" portion of its pension benefits; and (2) a $330 per month supplement associated with its "70/80 retirement," which was an early retirement benefit.

Prior to these changes, a pension eligible employee who retired from Edgewater Steel had his pension benefits paid out in two forms:

> (1) a special payment, which consists of a lump sum equal to thirteen weeks of vacation pay (fourteen weeks of vacation pay for those employees who retire after January 1, 1985, with twenty-five or more years of continuous service), subject to certain restrictions; this special payment is payable at the end of the month in which an employee retires and is considered payment for the first three months of the pension; and
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> (2) a "regular pension," which is equal to the higher of the "percent pension" or the "minimum pension" as defined in the Plan subject to

adjustments and a "pension cap"; the regular pension is paid monthly commencing after the three months for which the special payment is made.

See Appellees'/Cross-Appellants' Supplemental Appendix (Supp. App.) at SA-9-SA-13.

An employee who qualified for 70/80 retirement was eligible for the special payment and regular pension. In addition, the amount of the employee's regular pension was increased by $330 per month. *See* Supp. App. at SA-13. Section 2.6(c) of the Plan provided that an employee could receive 70/80 retirement if the employee's retirement is in the mutual interest of the employee and the company and is approved by the company under mutually satisfactory conditions.[2] *See* Supp. App. at SA-8.

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2. The text of § 2.6(c) is as follows:

> 2.6 Any participant who shall have had at least 15 years of Continuous Service and
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> (i) shall have attained the age of 55 years and whose combined age and years of Continuous Service shall equal 70 or more, or
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> (ii) whose combined age and years of Continuous Service shall equal 80 or more, and
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> . . .
>
> (c) who considers that it would be in his interest to retire, and the Company considers that such retirement would likewise be in its interest and it approves an application for retirement under mutually satisfactory conditions,
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> shall be eligible to retire and shall upon his retirement (hereinafter "70/80 retirement") be eligible for a special payment and a regular pension.

Supp. App. at SA-8.

The Plan's claims procedure required an employee to make a written claim for benefits to the Pension Board. *See* Plan § 16.1, Supp. App. at SA-47. If the Pension Board denied the claim, it had to give the claimant written notice of the specific reasons for denying the claim. *See id.* § 16.2, Supp. App. at SA-47. The claimant could then make a written request to the Pension Board for review of the denial. *See id.* § 16.3, Supp. App. at SA-47.

Apart from the Plan, Edgewater Steel also had a severance pay policy. *See* Joint Appendix (App.) at A-31. The terms of the severance policy are not clear from the document that embodies them. The Employees claim there was a clear practice under which employees who were laid off but not eligible for a pension of any sort were granted severance pay pursuant to this separate policy. The Employees contend that anyone who had left the company, regardless of the reason, had been given severance pay as a "separation bonus." Edgewater Steel never described or distributed the terms of the severance pay policy to its employees.

Through Kirkwood, Edgewater Steel notified all salaried employees in a letter dated January 15, 1987, that the special payment and the $330 per month supplement associated with 70/80 retirement, would be eliminated from the Plan. *See id.* at A-29. Kirkwood's letter informed the employees that this change would be effective February 1, 1987. In the letter, Kirkwood stated that this elimination of benefits was a cost-cutting necessity for Edgewater Steel.

Having received Kirkwood's January 15, 1987, letter, all of the Employees retired before February 1, 1987. All received the special payment that is provided automatically to all eligible retirees. None

received the $330 per month supplement associated with 70/80 retirement or severance pay.

There are individual differences in the employment history of the Employees. Rose Saxman (Saxman) was sixty-four years old at the time she left Edgewater Steel. Saxman conceded that she was not entitled to 70/80 retirement, *see id.* at A-530, and she does not make a claim for this benefit on appeal. The remaining four Employees were eligible for 70/80 retirement only under § 2.6(c) of the Plan. As noted, that subsection allows an eligible employee early retirement only if it is in the mutual interest of the employee and the company.

Before retirement, Dallas was the Director of Employee Benefits and a member of the Pension Board. William Kier, Jr. (Kier) did not apply for 70/80 retirement. Berger, Dallas and Wagner orally requested 70/80 retirement but did not file any written application or seek to appeal Edgewater Steel's informal oral refusal. Edgewater Steel never gave any of the Employees written notice or specific reasons for denying them 70/80 retirement.

When the Employees advised Edgewater Steel they would retire, Kutzmark and Rosati decided that no 70/80 retirements would be approved under the "mutual benefit" provision of § 2.6(c) of the Plan because, in Kutzmark's words, "[t]he company cost structure wouldn't stand it." *Id.* at A-265. In addition, Kutzmark and Rosati stated that Edgewater Steel wanted all of the Employees to remain employed and therefore the company's interest was not served by their retirements. *See id.* at A-168-A-172, A-266.

Rosati also stated that none of these Employees' positions was to be eliminated as part of the

company's reduction in force. *See id.* at A-168-A-170. All of the Employees were replaced after they left Edgewater Steel. *See id.* at A-227-A-228. In effect, the company adopted a blanket policy of denying all requests for 70/80 retirement under § 2.6(c) of the Plan.

On October 22, 1987, the Employees filed a complaint against Edgewater claiming violations of ERISA and misrepresentation under Pennsylvania law. The complaint alleged: (1) the elimination of the special payment violated § 204(g) of ERISA, 29 U.S.C.A. § 1054(g) (West Supp. 1990), which prohibits an employer from decreasing an "accrued benefit" by amending a pension plan (Count I); (2) the amendment of the Plan violated § 510 of ERISA, 29 U.S.C.A. § 1140 (West 1985), which proscribes discrimination for the purpose of interfering with the attainment of a plan benefit (Count II, Count III, ¶¶ 34, 35); (3) Edgewater wrongfully denied all of the Employees, except Saxman, 70/80 retirements in violation of ERISA (Count III); (4) Edgewater wrongfully denied the Employees severance pay (Count IV); and (5) the Kirkwood letter, announcing the amendments to the Plan, was an intentional or negligent misrepresentation under Pennsylvania law (Counts V-VIII).

In response to the complaint, Edgewater filed a motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss all but Count IV of the complaint. The district court dismissed Counts V through VIII of the complaint, which alleged pendent state claims for misrepresentation, holding that ERISA preempted these counts.

In February, 1989, the parties filed cross-motions for summary judgment on all remaining counts of the complaint. In a

Memorandum and Order dated June 13, 1989, the district court entered judgment in favor of Edgewater and against Dallas, Kier, Saxman and Wagner on all counts of the complaint. However, the court held Berger was eligible for 70/80 retirement and Edgewater's decision to deny it to him violated ERISA. Accordingly, the district court entered judgment in favor of Berger granting him 70/80 retirement and its accompanying $330 per month supplement.

All parties filed motions for reconsideration. On reconsideration, the district court concluded that Kutzmark and Rosati breached the fiduciary duties they had as plan administrators when they denied Berger, Dallas and Wagner's requests for 70/80 retirement. By Memorandum and Order dated July 25, 1989, the district court amended its Order of June 13, 1989, to grant Dallas and Wagner, in addition to Berger, 70/80 retirement and the accompanying $330 per month supplement.[3]

Despite the amended order, all of the Employees have appealed. They argue that the district court erred in: (1) ruling that Kier was not entitled to 70/80 retirement; (2) ruling that none of the Employees was entitled to severance pay; (3) ruling that Edgewater did not violate §§ 204(g) and 510 of ERISA; (4) denying their motion for leave to amend their complaint; (5) denying their motion to compel the production of documents; and (6) dismissing their state law misrepresentation claims. Edgewater has appealed the district court's

3. The appeals at Nos. 89-3465 and 89-3501 will be dismissed for lack of jurisdiction since they were both filed before the district court ruled upon the timely served motions for reconsideration. *See* Fed. R. App. P. 4(a)(4); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam).

order granting 70/80 retirement to Berger, Dallas and Wagner.

II.

The district court had subject matter jurisdiction pursuant to 28 U.S.C.A. § 1331 (West Supp. 1990) because this case arose under ERISA. This Court has appellate jurisdiction pursuant to 28 U.S.C.A. § 1291 (West Supp. 1990) over the final judgment of the district court.

Our scope of review over the district court's order dismissing parts of the complaint and granting summary judgment is plenary. *See Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988); *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 280 (3d Cir. 1988). We review for abuse of discretion the district court's denial of the Employees' motion for leave to amend the complaint and their motion to compel discovery. *See Coventry v. United States Steel*, 856 F.2d 514, 518 (3d Cir. 1988); *Marroquin-Manriquez v. I.N.S.*, 699 F.2d 129, .134 (3d Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

III.

To the extent the Employees seek to enforce the terms of the Plan, they must exhaust their administrative remedies before seeking judicial relief.[4] *See Weldon v. Kraft, Inc.*, 896 F.2d 793,

4. The Employees are not required to exhaust their administrative remedies before seeking judicial relief on their claim that Edgewater's amendment of the Plan violates § 510 of ERISA. *See Zipf v. American Tel. & Tel.*, 799 F.2d 889, 893 (3d Cir. 1986). In addition, there were no administrative remedies under the severance pay policy, and the Employees received the special payment. Thus, they could not exhaust their administrative remedies prior to seeking judicial relief on their other claims related to these benefits.

800 (3d Cir. 1990); *Zipf v. American Tel. & Tel.*, 799 F.2d 889, 891 (3d Cir. 1986); *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182, 185 (3d Cir. 1984). Although the exhaustion requirement is strictly enforced, courts have recognized an exception when resort to the administrative process would be futile. *See Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980); *see also Denton v. First Nat'l Bank*, 765 F.2d 1295, 1302-3 (5th Cir. 1985) (relying on *Amato*).

Here, the district court determined that resort to the Plan's administrative remedies would have been futile and accordingly, Dallas, Wagner and Berger did not have to exhaust those remedies. However, the district court held Kier failed to exhaust his administrative remedies because he never even applied for 70/80 retirement.[5]

In applying the futility exception to Dallas, Wagner and Berger, the district court concluded: (1) the evidence showed that the denial of 70/80 retirement was a "fixed policy"; (2) Edgewater's failure, even after a specific request, to provide written notice or specific reasons for the denial weighed in favor of applying the futility exception; (3) the testimony of Dallas, a member of Edgewater Steel's Pension Board, that after Kutzmark denied a request for 70/80 retirement, any administrative appeal was futile, was particularly significant; and (4) these employees under the circumstances acted reasonably in seeking immediate judicial review. *See* App. at A-121-A-122.

The Plan's administrative procedures required the Pension Board to notify a claimant in writing of the specific reasons for the denial of a claim. Although the three employees failed to make written requests for benefits, this does not excuse

5. As stated, Saxman makes no claim for 70/80 retirement.

Edgewater's failure to comply with the Plan's administrative procedures. It is clear that Berger, Dallas and Wagner made their desire for 70/80 retirement plain to the responsible company officials. In addition, it is clear that the company had adopted a policy of denying all applications for 70/80 retirement. *See id.* at A-265. We agree with the district court that Edgewater's blanket denial of 70/80 retirement under § 2.6(c)'s mutual interest provision and Edgewater's failure to comply with the Plan's administrative procedures weigh in favor of applying the futility exception to Dallas, Wagner and Berger. Given these circumstances, any resort by these employees to the administrative process would have been futile. Thus, the district court was correct in excepting these three employees from the exhaustion requirement.

Kier argues it would have been equally futile for him to seek administrative relief because Edgewater's policy of denying requests under § 2.6(c) of the Plan for 70/80 retirement was fixed and "no matter how hard he tried to attain [70/80 retirement], [he] would have been unsuccessful." The district court concluded Kier's argument lacked merit because he never even asked for 70/80 retirement. In his deposition, Kier admitted that he never even asked for 70/80 retirement, although he said it may have been mentioned when he told Dallas he was going to retire. *See id.* at A-505-A-506. We agree with the district court's conclusion that because Kier did not request 70/80 retirement, he is precluded from seeking judicial relief on his claims seeking to enforce the terms of the Plan.[6]

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6. Because of our holding regarding the futility exception, and because Saxman makes no claim for 70/80 retirement,

IV.

Accordingly, we must address on their merits the issues raised as to whether Edgewater's denial of 70/80 retirement to Berger, Dallas and Wagner violates ERISA. We will deal with each issue separately.

A.

Section 204(g) prohibits an employer from decreasing a participant's "accrued benefit" by amending a pension plan.[7] ERISA defines an "accrued benefit" as an individual's right to a retirement benefit "determined under the plan . . . expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C.A. § 1002(23) (West Supp. 1990). Construing a 70/80 early retirement plan, like the 70/80 retirement at issue in this case, this Court held that early retirement benefits are not accrued

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our subsequent discussion concerning: (1) whether Edgewater's denial of 70/80 retirement violated § 204(g) of ERISA; and (2) whether Edgewater breached its fiduciary duty under ERISA in denying 70/80 retirement, is applicable only to Berger, Dallas and Wagner.

7. Section 204(g), as amended, provides in relevant part:

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . . .
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> (2) For purposes of paragraph (1), a plan amendment which has the effect of—
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> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits.

29 U.S.C.A. § 1054(g).

benefits under ERISA because the statute provides that an accrued benefit commences at *normal retirement age*. Because early retirement benefits do not commence at normal retirement age, we held they are not accrued benefits. *See Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 284 (3d Cir. 1988). The 70/80 retirement at issue in this case is an early retirement benefit. Thus, the 70/80 retirement is not an accrued benefit and the denial of this benefit cannot violate § 204(g).

Section 204(g), as amended, provides that "a plan amendment which has the effect of—(A) eliminating or reducing an early retirement benefit . . . with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits." 29 U.S.C.A. § 1054(g)(2). The legislative history explains that this amendment to § 204(g):

> generally protects the accrual of benefits with respect to participants who have met the requirements for a benefit as of the time a plan is amended and participants who subsequently meet the preamendment requirements. The bill does not, however, prevent the reduction of a subsidy in the case of a participant who, at the time of separation from service (whether before or after the plan amendment) has not met the preamendment requirements.

S. Rep. No. 575, 98th Cong., 2d Sess. 28, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2547, 2574; *see also Hlinka*, 863 F.2d at 284 n.10. This provision of § 204(g) does not apply to this case because none of the Employees met the requirements for 70/80 retirement at the time that Edgewater amended the Plan. This included the requirement that their early retirement be in the

mutual interest of both them and the company. Although Edgewater's blanket denial of requests for 70/80 retirement could be seen as an amendment to the Plan, the instant provision still would not apply because none of the Employees met the requirements for 70/80 retirement prior to the time the blanket denial policy was instituted. All of the Employees left Edgewater Steel before meeting the requirements for 70/80 retirement. Accordingly, Edgewater's denial of 70/80 retirement to Berger, Dallas and Wagner does not violate § 204(g).

B.

Berger, Dallas and Wagner also argue Edgewater breached its fiduciary duty under ERISA in denying 70/80 retirement.[8] Analyzing a plan similar to the Plan at issue in this case, this Court held in *Hlinka* that the plan administrator and pension board had no element of discretion under the plan. *See* 863 F.2d at 286. We reasoned that only the employer determines whether an employee's retirement is in the company's best interest. Neither the plan administrator nor the pension board have the authority to override the company's business decision. Once the employer determines an employee's retirement is not in the

8. ERISA provides that:

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C.A. § 1002(21)(A) (West Supp. 1990).

company's best interest, "[t]he only recourse of the plan administrator and the pension board [is] to deny [the employee's] request for an early retirement under the 70/80 provision." *Id.*

In this case, in making the decision as to whether the Employees' retirements were in the company's interest, Edgewater was acting in its capacity as employer and not as a fiduciary under ERISA. *See Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075, 1079-80 (4th Cir.), *cert. denied*, 110 S. Ct. 281 (1989); *Hlinka*, 863 F.2d at 286. Because Edgewater was acting as an employer when it determined the Employees' retirements were not in the company's interest, the plan administrator and the Pension Board had no choice but to deny benefits. *See Hlinka*, 863 F.2d at 286.

The Plan itself did not give the fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the Plan. The administrator and Pension Board did not breach their fiduciary duties in denying the Employees' requests for 70/80 retirement, under the *de novo* standard of review made applicable by *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 956 (1989),[9] because § 2.6(c) of the Plan required them to accept the employer's decision. Since Edgewater, as employer, was not acting as a fiduciary, there was no breach of fiduciary duty under ERISA.[10]

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9. Under ERISA, a fiduciary is obligated to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." *See* 29 U.S.C.A. § 1104(a)(1) (West 1985).

10. We recognize that Edgewater states in its brief that in making its decisions on the Employees' applications for 70/80 retirement, "the Company . . . acted as [a] fiduciary." *See* Brief of Appellees/Cross-Appellants at 26. We believe, however, that this statement simply reflects Edgewater Steel's position that in making its decision as to whether the

Although there was no breach of a fiduciary duty imposed by ERISA, this case raises the issue of whether Edgewater, as employer, breached the contractual terms of Plan § 2.6(c) when it adopted a blanket denial policy with respect to requests for 70/80 retirement, without amending the Plan. *Hlinka* involved a single employee whose request was necessarily given individual consideration. The Employees in this case did not receive individualized consideration of their applications for 70/80 retirement.

It is undisputed that Edgewater Steel wanted all of the Employees to remain with the company. Thus, even if individual attention had been given to Berger, Dallas and Wagner's requests, the company still would not have concluded that any of their retirements were in its interest since it wanted all of them to stay on. Moreover, assuming Plan § 2.6(c) requires individual attention to each request, we believe the almost unbounded discretion the employer has under *Hlinka* to determine what is in the parties' mutual interest is subject to no more than the minimal obligation of good faith. There is no evidence on this record showing that Edgewater's desire to retain these employees was motivated by any bad faith, with respect to their individual entitlement under the Plan or otherwise. Thus, as a matter of law,[11] Edgewater's action was not a breach of its duty of good faith under the Plan. Accordingly,

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Employees' retirements were in the company's interest, it was acting as an employer but after the company had made this decision, it was acting as a fiduciary in administering § 2.6(c) of the Plan.

11. Because there is no evidence of bad faith on the part of Edgewater, there is no material factual dispute as to whether Edgewater breached any implied duty of good faith.

Edgewater's failure to give individual attention to the Employees' requests was without consequence on this record.

We recognize that this conclusion upholds Edgewater's elimination of all chance for early retirement under the mutual interest provision of the Plan without going through the process of amending the Plan. The threshold question, however, is whether an amendment was required under the circumstances of this case. The Employees here had no basis for reliance on the mutual interest provision of the Plan. The Employees' depositions show that they knew they were not going to receive 70/80 retirement before they left Edgewater. The record also shows that Edgewater was in serious financial trouble at the time. We do not believe the Plan can be read to require Edgewater to provide early retirement benefits on the basis of mutual interest under these circumstances. Therefore, we do not believe that Edgewater breached any duty in this case. We express no opinion on whether a blanket refusal of benefits would be proper absent these facts. *See Frank v. Colt Industries, Inc.*, No. 89-3412 (3d Cir. August 6, 1990); *Hozier v. Midwest Fasteners, Inc.*, No. 89-5551 (3d Cir. July 24, 1990); *see also Wolfe v. J.C. Penney Co.*, 710 F.2d 388 (7th Cir. 1983).

Since Edgewater did not breach any fiduciary duty under ERISA and there is no evidence that it acted in bad faith or in violation of any enforceable contractual obligation when it denied the Employees' claims for 70/80 retirement, we conclude the district court erred in granting summary judgment in favor of Berger, Dallas and Wagner on their claims for wrongful denial of 70/80 retirement.

V.

The Employees also argue they are entitled to severance pay because Edgewater breached its fiduciary duty by failing to comply with ERISA's disclosure and reporting requirements in connection with the company's severance pay policy. In support of this argument the Employees rely on *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985).[12] The severance pay policy is vague. By virtue of its vagueness, it gave the fiduciary discretionary authority to determine eligibility for benefits. Thus, we review Edgewater's action surrounding this issue under the arbitrary and capricious standard. *See Bruch*, 109 S. Ct. at 956.

In *Blau*, an employer failed to comply with ERISA's procedural requirements. The company had a secret severance pay policy which it actively concealed by keeping it confidential. This was in violation of ERISA's reporting and disclosure requirements. *See* 29 U.S.C.A. §§ 1021-1031 (West 1985 & Supp. 1990). The policy also had no claims procedure as required by 29 U.S.C.A. § 1133 (West 1985). Moreover, there was evidence that under the secret policy, severance pay would be available for a company president or vice-president but not for a salaried non-union employee. *See Blau*, 748 F.2d at 1356. The Ninth Circuit reasoned that the company's violations of ERISA's procedural requirements in implementing the secret severance pay policy rose to such a level that "they alter[ed] the substantive relationship between employer and employee that disclosure, reporting and fiduciary duties sought to balance somewhat more equally."

12. The parties do not contest the district court's assumption that ERISA applies to the severance pay plan at issue in this case. We believe the district court's assumption was correct. *See Blau*, 748 F.2d at 1352.

Id. at 1354. The court held that "[i]n light of the evidence of serious violations of ERISA by [the employer], we find that [the employer's] decision could not be said as a matter of law not to be arbitrary and capricious . . . ."[13] *Id.* at 1357. Thus, the court reversed the district court's entry of summary judgment in favor of the employer.

In the instant case, Edgewater Steel concedes it violated ERISA's procedural requirements by failing to describe or distribute the severance pay policy to its employees. In addition, there was no claims procedure under the severance pay policy. The written terms of the policy are rather cryptic. *See* App. at A-31. Edgewater claims there was a clear practice under the policy whereby only employees who were laid off and not eligible for an immediate pension of any sort, qualified for severance pay.[14] The Employees on the other hand contend it was common knowledge that when an employee retired, that employee received severance pay.

Edgewater's procedural violations and its administration of the severance pay policy do not rise to the level of violations in *Blau*, which influenced the court to conclude that it could not be said that the employer's actions were not arbitrary or capricious. There is no evidence that Edgewater actively concealed its severance pay

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13. Because the plaintiffs had not moved for summary judgment, the court declined to consider whether the employer's action was arbitrary and capricious as a matter of law. *See Blau*, 748 F.2d at 1357.

14. Because the issue is not properly raised on the record before us, we decline to consider whether Edgewater Steel's version of its severance pay policy would violate the Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621-634 (West 1985 & Supp. 1990).

policy. Nor is there anything on this record to indicate that Edgewater was administering the severance pay policy in an unfair manner. On this record, Edgewater's actions were not arbitrary or capricious. Moreover, this Circuit has apparently rejected the reasoning that substantive remedies, such as the severance pay the Employees seek on appeal, are available for violations of ERISA's procedural requirements. *See Hozier*, slip op. at 25-34; *see also Wolfe*, 710 F.2d at 393. Thus, the district court was correct in concluding that Edgewater did not breach its fiduciary duty by denying severance pay to the Employees.

VI.

There remain two issues concerning the proposed elimination of the special payment, a lump sum payment equal to thirteen or fourteen weeks of vacation pay, which accompanied all retirements whether early or at normal retirement age. All five employees contend the proposed elimination of this benefit violated § 204(g) of ERISA and entitled them to relief under the rationale of *Blau*. As previously noted, § 204(g) prohibits an employer from decreasing a participant's "accrued benefit" by amending a pension plan.

Although the district court held the special payment was an accrued benefit, it held that the Employees lacked standing to challenge the elimination of the special payment under § 204(g) because they all elected to take early retirement and they all received the special payment. *See* App. at A-87.

An accrued benefit is an individual's right to a retirement benefit (1) "determined under the plan" and (2) "expressed in the form of an annual benefit

commencing at normal retirement age." *See* 29 U.S.C.A. § 1002(23). Whether the special payment is an accrued benefit is a difficult question. However, we need not decide that issue in order to address the Employees' claims under § 204(g). In general, employees who retire and elect to receive retirement benefits without any intention of returning to employment do not have standing under ERISA to challenge subsequent changes to a retirement plan. *See Kuntz v. Reese*, 785 F.2d 1410 (9th Cir.) (per curiam) (plaintiffs whose vested benefits under a plan have been distributed in lump sum lack standing to bring an action under ERISA), *cert. denied*, 479 U.S. 916 (1986); *Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 708-9 (5th Cir. 1985) (per curiam) (employee lacks standing under ERISA to bring action over one year after his retirement claiming that a change in a retirement plan effective after his retirement forced him to retire early thus depriving him of several years of income and decreasing his final retirement benefits).

In denying the Employees standing on what seems to be a claim for a make whole remedy because of Edgewater's violation of § 204(g), the district court relied on our decision in *Saporito v. Combustion Eng'g Co.*, 843 F.2d 666 (1988), *vacated*, 109 S. Ct. 1306 (1989), holding that an employee who elects to receive a retirement benefit lacks standing to bring a claim for breach of a fiduciary duty under ERISA because he is no longer a "participant" in the plan. *See* 29 U.S.C.A. § 1132(a)(1) (West 1985) (civil actions under ERISA are restricted to actions brought by "a participant or beneficiary"). However, apparently unknown to the district court, the Supreme Court had vacated our judgment in *Saporito* and remanded to us for

further proceedings consistent with its opinion in *Bruch*. *See* 109 S. Ct. 1306. We, in turn, remanded the case in part to the district court. *See* 879 F.2d 859 (table). Thus, we can no longer rely on *Saporito* to deny standing.

However, in denying standing to the plaintiffs in *Kuntz*, the Ninth Circuit said:

> The Kuntz plaintiffs are all former employees who have already received their vested benefits. There are no allegations of plans to return to work or to start accruing benefits once again under the pension plan. . . . Former employees who have neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits simply do not fit within [ERISA's definition of "participant"].

Kuntz, 785 F.2d at 1411. In *Bruch*, the Supreme Court cited the standard enunciated in *Kuntz* with approval. *See Bruch*, 109 S. Ct. at 958. Here, as in *Kuntz*, the Employees do not claim they want to return to work. Of course, we recognize that if the Employees were constructively discharged as they do claim, they would not necessarily have to return to work in order to have standing to claim a make whole remedy. However, for the reasons set forth in Part VII of this opinion, dealing with the Employees' § 510 discrimination claim, we agree with the district court that they were not constructively discharged. We believe *Kuntz* remains good law and is persuasive on the standing issue.

In this case, the Employees all decided to retire and they received the special payment. Accordingly, the Employees lack standing to challenge under § 204(g) the elimination of the special payment, which took place after they

retired, because the record fails to show they had any intent to return to work.

We also reject the Employees' claims for substantive relief under the rationale of *Blau*. Although Edgewater committed some procedural violations in administering and amending the special payment provision of the Plan, there is nothing that rises to the level of the procedural violations in *Blau*. There was no active concealment of the Plan, and a claims procedure was in place even though it was not complied with. Again, there is no evidence on the record before us that some employees received preferential treatment in Edgewater's administration of the Plan. Thus, the Employees are not entitled to substantive relief even if *Blau* remained viable in this Circuit.

VII.

The Employees also argue that Edgewater violated § 510 of ERISA.[15] They contend that Edgewater's decision to eliminate the special payment and the $330 per month supplement associated with the 70/80 retirement, coupled with Kirkwood's letter announcing these amendments, was an intentional interference with their right to

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15. Section 510 provides in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C.A. § 1140.

the special payment and the $330 per month supplement.[16]

In order to establish a prima facie case under § 510, an employee must show: "(1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled." *See Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3rd Cir.), *cert. denied*, 484 U.S. 979 (1987); *see also Hendricks v. Edgewater Steel Co.*, 898 F.2d 385, 389 (3d Cir. 1990) (relying upon *Gavalik*). In this case, the Employees argue that elimination of the special payment and the $330 per month supplement amounted to a constructive discharge that states a prima facie case under § 510.

In an action brought under Title VII, this Court has applied an objective, reasonable person test to determine whether an employee was constructively discharged. *See Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 888 (3d Cir. 1984). In order to conclude that an employee was constructively discharged, a court must find "that the employer knowingly permitted conditions . . . in employment so intolerable that a reasonable person subject to them would resign." *Id.* The Seventh Circuit has reasoned that with regard to a challenge to early retirement benefits under the Age Discrimination in Employment Act (ADEA) a constructive

16. The Employees argue they are entitled to reinstatement and back pay as a result of Edgewater's violation of § 510. *See* Brief for Appellants/Cross-Appellees at 26-27. It is unclear whether the Employees are seeking the award of 70/80 retirement or reinstatement with back pay. They obviously would not be entitled to both. In addition, they have already received the special payment. If they were awarded reinstatement and back pay, they would not be entitled to retain the early retirement benefit they also seek.

discharge occurs only if the plaintiffs show they "would have been fired (in violation of the ADEA) had they turned down the offer of early retirement." *See Henn v. National Geographic Soc'y*, 819 F.2d 824, 830 (7th Cir.), *cert. denied*, 484 U.S. 964 (1987).

In this case, Edgewater's conduct, which consisted of informing the Employees of the proposed Plan amendments that would eliminate the special payment and $330 per month supplement, does not rise to the level of a constructive discharge. Edgewater did not create conditions so intolerable that a reasonable person would resign. It merely decided to amend the Plan in the interest of cutting costs. There is nothing to indicate that the Employees would have been fired had they not chosen to retire and accept the special payment. To the contrary, it is undisputed that Edgewater Steel wanted all of the Employees to remain with the company. Thus, there was no constructive discharge, and the Employees have not established a prima facie case under § 510.[17]

17. If the Employees had established a prima facie case under § 510, "[the] burden then must shift to the employer to articulate some legitimate . . . reason" for the challenged action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *see also Gavalik*, 812 F.2d at 852-53 (applying *McDonnell Douglas* to an action under ERISA). "[T]he employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 257 (1981). Although the burden of production shifts to the employer at this stage, the ultimate burden of persuading the court that the employer acted illegally rests with the employee. *Id.* at 253.

In this case, Edgewater Steel did articulate a legitimate reason for its decision to eliminate the special payment—the company's poor economic performance and its need to cut

VIII.

In addition, the Employees contend the district court erred in holding that ERISA preempted their state law claims for misrepresentation. The Employees' misrepresentation claims are based upon Kirkwood's January 15, 1987, letter informing Edgewater Steel's employees of the proposed Plan amendments. The Employees apparently allege that the letter misrepresented that the special payment would be taken away if they did not retire before February 1, 1987. Section 514(a) of ERISA, 29 U.S.C.A. § 1144(a) (West 1985), preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. The district court was clearly correct in holding that § 514(a) preempts the Employees' misrepresentation claims, since they relate to an employee benefit plan. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983).

IX.

Finally, we deal with the Employees' contention that the district court erred in denying their motion for leave to amend their complaint and their motion to compel the production of documents. On January 6, 1989, after the close of discovery, the Employees filed a motion for leave to amend. The appendix contains only the motion itself. The text of the complaint as it would appear if the amendment had been allowed is not

costs. *See* App. at A-255-A-256, A-265. Thus, Edgewater introduced evidence sufficient to meet its production burden, and the Employees produced no evidence to show that Edgewater's legitimate reason was a pretext for discrimination. *See McDonnell Douglas*, 411 U.S. at 804-805. Therefore, even if the Employees did produce evidence sufficient to make out a prima facie case, they did not show a violation of § 510 of ERISA.

furnished. *See* App. at A-75-A-76. Moreover, in their brief, the Employees do not explain the purpose of the amendment beyond stating that they had learned during the course of discovery that one of Edgewater Steel's officers, who was also a highly compensated employee, was granted a 70/80 retirement in November, 1986, thus qualifying him for the $330 per month supplement, whereas the Employees were discriminatorily denied those benefits when they were forced to retire.

It seems to us from an examination of the motion itself that the parties were attempting to assert a new claim, based on discrimination with respect to 70/80 retirement in favor of officers or highly compensated employees or, perhaps in the alternative, a claim that such discrimination amounted to special circumstances that would entitle them to substantive relief for purely procedural violations of ERISA under the rationale of *Blau*. The district court denied the motion without stating any reasons. Because of the district court's failure to set forth its reasons, the Employees contend that its denial of their motion for leave to amend was an abuse of discretion under the rationale of *Coventry v. United States Steel*, 856 F.2d 514, 519-20 (3d Cir. 1988).

We think this case is distinguishable. In *Coventry*, this Court pointed out that mere delay would not be sufficient to justify the denial of leave to amend, but that some prejudice to the non-moving party or the court must be shown. In *Coventry* we stated:

> In the present case, however, the nature of the claim that [the plaintiff] sought to add by his amendment indicates that no additional discovery would have been necessary. More

> importantly, it appears that any additional discovery that [the defendant] might have been required to produce would not have been unduly burdensome since it would have concerned the same subject matter as an issue already in the case (the validity of the various provisions of the 70/80 mutual pension plan), and about which discovery had previously occurred.

Id. at 519.

The quoted passage demonstrates the distinction between this case and *Coventry*. Here, new and extensive discovery concerning the pre-January 15, 1987, practices of Edgewater in connection with § 2.6(c) of the Plan would have been necessary in order to develop the Employees' theory of discrimination in favor of highly compensated employees or, alternately, special circumstances that permit a substantive remedy for procedural violations of ERISA under the rationale of *Blau*. Thus, while we believe the district court should have paid heed to the teaching of *Coventry* and stated its reasons for denying the motion to amend, we think the record here shows there was no abuse of discretion.

Unlike *Coventry*, it is plain that allowing the amendment here would inject new issues into the case requiring extensive discovery. The motion not only came four and one-half months after the information on which it was based became available, but also after the close of an extended discovery period on November 15, 1988. It is clear to us, as it must have been to the district court, that granting the Employees' motion to amend to add a claim of discrimination in favor of highly compensated employees on the basis of a single incident, which occurred approximately two months before the company announced its plan to

terminate that provision, would entail extensive factual investigation.

The allowance of the Employees' untimely motion for leave to amend by adding this new and substantially broader claim would put an unwarranted burden on the trial court and be likely to result in prejudice to Edgewater. Thus, we find no abuse of discretion under the circumstances of this case.[18]

X.

For the reasons stated above, we will reverse the district court's orders granting judgment in favor of Berger, Dallas and Wagner and awarding them 70/80 retirement and the $330 per month supplement. We will remand this case to the district court with instructions to enter judgment in favor of Edgewater on all counts of the complaint. Costs shall be taxed against the Employees.

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18. In a related argument, the Employees also contend the district court erred in denying their motion to compel the production of documents. During discovery the Employees moved to compel Edgewater to produce certain employment contracts for "highly compensated" employees that would allegedly show that Edgewater gave those employees pension benefits not provided to other employees. The district court denied this motion without stating any reasons. In consideration of its order denying leave to amend and our unwillingness to disturb that order, we do not believe the district court abused its discretion in denying the Employees' motion to compel production of this information, which would seem to us largely material to the claim the Employees sought to assert in their proposed amendment.

SLOVITER, *Circuit Judge, dissenting.*

I agree with the majority's opinion as to all issues except those covered in Part IV. I respectfully disagree with the majority's holding that the plaintiffs' ERISA claim based on the denial by Edgewater Steel (Company) of the employees' 70/80 retirement benefits cannot proceed.

I begin my analysis of the issues raised as to 70/80 retirement with the Supreme Court's decision in *Firestone Tire and Rubber Co. v. Bruch*, 109 S. Ct. 948 (1989). The Firestone plan, like the Edgewater plan, was administered by the employer. The plan authorized severance benefits for employees released because of "a reduction in work force." *Id.* at 951. Firestone sold five of its plants as going concerns to another company. Firestone employees who had been rehired by the purchasing company sought severance benefits under the Firestone plan which were denied to them on the ground that the sale did not constitute a reduction in work force. The issue on appeal and before the Supreme Court was the appropriate standard of review to be applied by a court reviewing the denial of benefits.

The Supreme Court recognized that "the validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue." *Id.* at 956. Noting that under the law of trusts, "courts construe terms in trust agreements without deferring to either party's interpretation," *id.* at 955, the Court held that "a denial of benefits challenged under [29 U.S.C.] § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 956. The Court held this standard of review

applies regardless of whether the plan is funded or unfunded, and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest, although that conflict is a factor that must be weighed in determining whether there was an abuse of discretion. *Id.*

In this case, the district court held that the Edgewater plan provides the administrator with discretion, applied the arbitrary and capricious standard of review, rather than *de novo* review, to the decision of the administrator to deny benefits, and found that the decision denying benefits was arbitrary and capricious. In contrast, the majority states that "the plan administrator and the Pension Board had no choice but to deny benefits." Maj. Typescript Op. at 17. If this is so, then we are obliged under *Firestone* to apply a *de novo* standard of review to the provisions of the plan, and apparently the majority agrees.

Exercising the appropriate *de novo* standard, I believe it is clear that the Company's pension plan evidences an undertaking by the Company, as an employer, to give an employee who sought to retire under the 70/80 program and who met the age and service requirements an individualized determination as to whether the particular retirement would be in the "interest" of the Company. The majority acknowledges that the employer did not do so in this case. Instead, Rosati and Kutzmark, the "top management of Edgewater", made a decision that mutual agreements under the 70/80 plan were too expensive to the Company, and thus "the company had adopted a policy of denying all applications for 70/80 retirement." Maj. Typescript Op. at 12. Therefore, Edgewater effectively nullified the

provision in the plan providing for a 70/80 benefit when it was in the mutual interest of the employee and the Company.

The majority does not deny that Edgewater effectively amended the plan to eliminate individualized consideration of the employees' applications for 70/80 retirement. Instead, it concludes that "Edgewater's failure to give individual attention to the Employees' requests was without consequence on this record." Maj. Typescript Op. at 19. I believe that in reaching this conclusion, the majority's approach to unofficially amended plans is inconsistent with our recent opinion in *Hozier v. Midwest Fasteners, Inc.*, No. 89-5551 (3d Cir. July 24, 1990).

In *Hozier*, we adopted the position taken by several other circuits that section 402(a)(1) of ERISA, which requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1), precludes oral modifications to a plan to either increase or decrease benefits. *Hozier*, slip op. at 18. We held that when an employer does not reduce to writing an oral modification to an ERISA plan and thus fails to follow the ERISA requirements applicable to plan amendments, we must proceed as if the unamended plan was still in effect at the time the benefits were denied. Although the plan at issue in *Hozier* was a welfare plan in contrast to the pension plan at issue here, we made it clear that oral amendments to pension plans are precluded as well. *Id.*, slip op. at 19. *See also Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120 (4th Cir. 1989) (no oral modification of pension plan); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) (same); *Nachwalter v. Christie*, 805 F.2d 956-60 (11th Cir. 1986) (same).

Under the *Hozier* holding, the plaintiffs are entitled to consideration of their applications for 70/80 retirement under the pre-amendment terms of the Edgewater plan, which in this case requires an individualized consideration of whether it was in the "interest" of the Company to permit the three employees in question to retire with 70/80 benefits under section 2.6(c) of the Plan. The majority treats the negative decision by the employer as effectively unreviewable, subject only to a good faith standard, despite the fact that the employer did not make an individualized determination. The majority believes this result is compelled by our decision in *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279 (3d Cir. 1988).

Hlinka, a salaried senior research fellow, unsuccessfully sought early retirement under the 70/80 pension provided by Bethlehem Steel. His request was denied because his continued employment was in Bethlehem Steel's interest "because of [Hlinka's] extensive and unique technological expertise related to the project to which he was assigned." *Id.* at 284 n.7. Significantly, in *Hlinka* we noted that during the period from 1983 to 1986, the year in which Hlinka requested 70/80 benefits, more than 1,000 employees were granted 70/80 benefits under the same mutual interest provision that Hlinka sought to invoke. *Id.* at 286. While I agree that our precedent supports giving broad leeway to an employer's decision that its interests require retention of a particular employee, I see nothing in our precedent, or indeed in any case law cited by the majority, for the proposition that similar leeway must be given to the employer's decision that *no* employee's retirement would be in its interest when that decision has been made

pursuant to an unofficial amendment to the plan which is unauthorized under ERISA and violates the provisions of the plan itself.[1]

Because Edgewater never made an individualized determination as to whether retirement for the particular employees would be in its interests, and because a *post hoc* determination by it is not realistically feasible, a factfinder must decide whether an individualized determination made at that time would have been favorable to the employees. The majority states that it is undisputed that the Company wanted all of the employees to remain and that even if given individual attention these employees would have been denied 70/80 retirement. In effect then, the majority holds summary judgment should be granted for the defendants on the 70/80 retirement issue.

I believe that a fair examination of the record for evidence of the employer's interest vis-a-vis retention of each of the employees in question does not support that result. The record fails to satisfy the rigorous requirements for the grant of summary judgment. Any doubt as to the existence of a genuine issue should be resolved against the moving party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). The inquiry is particularly difficult where liability turns on a party's state of mind. *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir. 1989); *see also Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922, 928 (1st Cir. 1983) (in cases

1. The Plan provides that: "[w]hile the Company expects and intends to continue the Plan, the Company may amend the Plan at any time and from time to time by resolution outlining the changes to be made . . . ." Noncontributory Pension Plan for Salaried Employees of Edgewater Steel Company § 14.1 (1985), Supp. App. at 43.

where the state of mind of one of the parties is crucial to the outcome of the case, resort to summary judgment is vested with more than the usual difficulty and under the circumstances jury judgments are typically thought to be of special importance).

The majority apparently relies on the depositions of Kutzmark and Rosati, in which both stated that it was not in Edgewater's interest to have these employees retire. Maj. Typescript Op. at 8; App. at 169, 266. Yet, in a memo written immediately subsequent to a meeting with Dallas, Rosati stated that he told Dallas that Edgewater would not grant her request and that "although she didn't ask, the reason is that we are not planning to do it for anybody else." App. at 210, 238. Plainly then, in light of Rosati's contemporaneous writing showing that Edgewater did not give Dallas individualized consideration and was not going to give *any* 70/80 mutual interest benefits, a factfinder might not credit Rosati's after-the-fact testimony that on an individualized determination, the Company would have reached the same result. As this court has recently suggested, a reasonable factfinder would be entitled to treat skeptically the present testimony of management officials "who either are or were employees of defendants themselves." *Hozier*, slip op. at 24.

Indeed, the district court, after reviewing the depositions, concluded that "there may have existed a mutual interest in having the plaintiffs retire." Memorandum Op. at 14 (July 25, 1989). Certainly, the depositions of the plaintiffs show a genuine issue of material fact on the dispositive issue.

Plaintiff Dallas, who was the director of employee benefits, was outspoken to Company management in her disagreement with the Company's direction that she counsel employees

that the special payment was not an accrued benefit. *See* App. at 443-44. Thus, although Dallas was not slated to be part of the work force reduction, the disagreement as to the Company's tactics may have led Edgewater, were it faced with the need to make an individualized determination as to Dallas, to permit her to retire and replace her with a more amenable director.

The district court noted that Wagner, a superintendent, testified that Edgewater eliminated all but two of the superintendents "and replaced them with the newly created hot and cold superintendents." Wagner was one of the two remaining superintendents, and the other was about to retire. The district court stated that "Wagner may have been the next superintendent in line to be eliminated." Memorandum Op. at 15. Further, Wagner testified that to entice other superintendents to retire, Edgewater gave them 70/80 benefits. A factfinder could determine that without the ineffective amendment to the plan, Edgewater might have found that it was in its interest also to grant Wagner 70/80 benefits.

Finally, Berger testified that Rosati had cut his salary and appeared to be trying to lay the groundwork to terminate him by attempting to place in his file a letter stating that he was not properly performing his job. App. at 372-74. The district court believed that it may have been in Edgewater's interest to have Berger retire. Memorandum Op. at 15.

I do not suggest that the record ineluctably points to one conclusion or another as to the interests of the Company, but merely that there is a genuine issue for trial which precludes the majority's decision that summary judgment on the issue should have been granted. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

The purpose behind ERISA is clear. It "was enacted to 'promote the interests of employees and their beneficiaries in employee benefit plans' . . . and 'to protect contractually defined benefits.'" *Bruch*, 109 S. Ct. at 955 (citations omitted). Congress created disclosure provisions to ensure that "'the individual participant knows exactly where he stands with respect to the plan.'" *Id.* at 958 (citing H.R. Rep. No. 93-533, p. 11 (1973)). Section 402(a)(1), which mandates that the plan be written, was designed to ensure that "'every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan.'" *Hozier*, slip op. at 18 (citing H. Rep. No. 1280, 93d Cong., 2d Sess. 297, *reprinted in*, 1974 U.S. Code Cong. & Admin. News 5038, 5077-78).

I believe that the majority's decision, which effectively allows Edgewater to amend its plan by an unwritten policy, is inconsistent with ERISA. Its determination that this was without consequence in this case overlooks the record evidence and permissible inferences therefrom which could lead a factfinder to determine that it would have been in Edgewater's interest to have permitted these employees to retire, if Edgewater had been acting pursuant to the terms of the plan as reduced to writing at that time. Thus, I dissent from the majority's disposition of the claims for 70/80 retirement benefits.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Opinion of the United States District Court for the Western District of Pennsylvania Dated July 25, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 87-2250

DONALD BERGER, BARBARA DALLAS, WILLIAM KIER, JR., ROSE SAXMAN and ROBERT WAGNER,

Plaintiffs,

v.

EDGEWATER STEEL COMPANY, a subsidiary of EDGEWATER CORPORATION, EDGEWATER CORPORATION, and EDGEWATER STEEL COMPANY AS PLAN ADMINISTRATOR OF THE NON-CONTRIBUTORY PENSION PLAN FOR SALARIED EMPLOYEES,

Defendants.

MEMORANDUM OPINION

The instant matter is before the Court on motions to alter or amend the June 13, 1989 judgment of this Court, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, filed on behalf of the plaintiffs, Barbara Dallas, William Kier, Jr., and Robert Wagner, and the defendants, Edgewater Steel Corporation, *et al.*

In our memorandum opinion and order of June 13, 1989, we decided that plaintiff-employee Donald Berger was the only employee who met the eligibility requirements of the 70/80 pension found in section 2.6(a) of the 1985 Edgewater Steel Corporation employee benefit plan and could recover the pension and $330 monthly supplement under Section 502(a) of ERISA, 29 U.S.C. §1132(a). Here, Barbara Dallas, William Kier, Jr., and Robert Wagner assert that this Court failed to properly apply the Rule of 80 pension to them. This Court has determined that we erred in failing to calculate the Rule of 80 age and service requirements for Barbara Dallas, William Kier, Jr., and Robert Wagner.

However, the defendants assert that we improperly interpreted the term layoff to mean discharge. After careful consideration, we determine that we erred in this interpretation. Section 2.6(a) of the 1985 Edgewater employee benefit plan clearly does not provide that employees who are discharged, constructively or otherwise, are entitled to an early retirement pension. However, the plaintiffs may recover an early retirement 70/80 benefit and supplement under section 2.6(a) of the 1985 Edgewater plan. Therefore, we shall determine whether the plan administrator properly administered Section 2.6(c) of the 1985 Edgewater employee benefit plan, when he denied benefits to the plaintiffs.

First, we must decide whether the plaintiffs have exhausted their administrative remedies. *See Wolf v. National Shopmen Pension Fund*, 728 F.2d 182 (3d Cir. 1984). Plan participants must attempt to comply with the application and review procedures found in the plan. The futility exception is satisfied if the administrator discloses that its position has become fixed and the employer is unwilling to provide benefits. *See Clayton v.*

Automobile Workers, 451 U.S.1 679, 689-693, 1010 S.Ct. 2088, 2095-97, 68 L.Ed.2d 538 (1981). *See also Glocowski v. Penn Cent. Transp. Co.*, 571 F.2d 747 (3d Cir. 1977). Hostile or bitter treatment by the plan administrator or pension committee may indicate a fixed position.

We first inquire whether the plaintiffs through their actions have satisfied the futility or exhaustion requirements. Mrs. Dallas testified that around January 20, 1987 she went into Mr. Rosati's and "asked to be considered for the 70/80 type retirement" under the mutual interest section of the plan. Mr. Rosati replied that he would have to check with Mr. George Kutzmark, Edgewater's executive vice-president. Several days later Mr. Rosati related to Mrs. Dallas that Mr. Kutzmark had denied her request. She did not appeal Mr. Kutzmark's decision. Dallas Deposition at 43-49. Mrs. Dallas also recalls asking Mr. Rosati a second time whether she could receive the 70/80 without the $330 supplement. She testified that either Mr. Rosati said he would check with Mr. Kutzmark or he denied it outright. *See* Dallas Deposition at 50-51.

Mr. Wagner testified that he asked Mrs. Dallas if he could receive the 70/80 pension and supplement. Mrs. Dallas informed Mr. Wagner that Mr. Rosati decided who received the 70/80 pension. *See* Wagner Deposition at 13. Mr. Rosati advised Mr. Wagner that Edgewater was not giving any 70/80 pensions.

Mr. Wagner then appealed to Mr. Kutzmark who told Mr. Wagner that Edgewater was "not giving any 70/80's out." Mr. Wagner asked Mr. Kutzmark to put his decision in writing as to why Edgewater was not giving him the benefit. It was at that point that Mr. Wagner informed Mr. Kutzmark that he was going to seek legal counsel. *See* Wagner Deposition at 16-17. When asked

why Mr. Wagner failed to appeal Mr. Kutzmark's decision, Mr. Wagner responded, "I didn't feel I had to when I talked to Mr. Kutzmark. He was the top of the line. If he turned me down, what's the sense in asking anybody else." *See* Wagner Deposition at 25.

Although we previously concluded in our memorandum opinion of June 13, 1989 that Mr. Berger exhausted his administrative remedies, we have made a second examination. Mr. Berger testified that he asked Mr. Rosati "[i]f he would give me it in writing that I was being denied the 70/80 . . . . He said, well, what for, and I asked him, you know, why, as being a company official, I wanted some paper there to indicate that I've tried everything I could to get a mutual pension." *See* Berger Deposition at 26. Mr. Rosati responded that the 70/80 was "not available." Subsequently, Mr. Kutzmark rejected Mr. Berger's appeal for a 70/80. *See* Berger Deposition 26-28.

From the record, we discern that employees went first to Mrs. Dallas and she informed them that Mr. Rosati made the decision on the 70/80's. However, the record also demonstrates that employees could appeal to Mr. Kutzmark and that Mr. Kutzmark was the end of the line for granting or denying the 70/80. We find the actions of Mrs. Dallas, as a member of the pension board, particularly significant. Mrs. Dallas testified that after Mr. Kutzmark denied the 70/80, any appeal except to this Court was futile. Mrs. Dallas's actions are consistent with her testimony that the pension board recommended pensions and that it was top management who determined whether an employee received a 70/80 pension and supplement.

The record also evidences that the 70/80 denial policy was a fixed policy. Both Mr. Rosati and Mr. Kutzmark used language such as "not available" and "we're not giving any 70/80's out" when they denied the plaintiffs a 70/80 pension.

Additionally, the Third Circuit has held that 29 U.S.C. §1133 provides that the employer must provide notice and articulate specific reasons for the denial to the participant and provide the participant an opportunity for review. Failure to provide written notice of the decision permits the court to fine the administrator up to $100 per day under section 502(c). *See Grossmuller v. International Union, United Automobile Aerospace and Agricultural Implement Workers of America*, 715 F.2d 853 (3d Cir. 1983). *See also Groves v. Modified Retirement Plan for Hourly Paid Employees*, 803 F.2d 109, 114 (3d Cir. 1986). We find that these violations are factors to consider in deciding whether futility exists. In determining futility, the conduct of the plan administrator should be balanced aginst the participants failure to comply with plan procedures. *See Denton v. 1st National Bank*, 765 F.2d 1295, 1302-1303 (5th Cir. 1985). In this case, Edgewater failed to provide written notice or specific reasons for the denial even after Mr. Wagner and Mr. Berger demanded it.

We also find that confronted with the fixed denial policy and knowing that the buck stopped with Mr. Kutzmark, the plaintiffs acted reasonably when they sought relief here rather than attempting any further appeals within the company. We conclude that Mrs. Dallas, Mr. Wagner, and Mr. Berger exhausted their remedies.

On the contrary, Mr. Kier testified that he never applied for the 70/80 pension and supplement. *See* Kier Deposition at 22, 25. He testified that he mentioned it to

Mr. Berger and to Mr. Simpson. He further testified that he may have mentioned it to Mrs. Dallas and that she informed him that Edgewater was denying the 70/80 to everyone. *See* Kier Deposition at 25-26. We conclude that Mr. Kier has failed to present evidence that he attempted to receive a final determination from Edgewater concerning the 70/80 pension. One cannot exhaust his administrative remedies by failing to exhaust his efforts within the company, whether through the plan mechanisms or through personal appeals.

The plaintiffs seek relief under Section 2.6(c) of the 1985 Edgewater employee benefit plan. Section 2.6(c) provides that an employee "who considers that it would be in his interest to retire, and the Company considers that such retirement would likewise be in its interest and it approves an application for retirement under mutually satisfactory conditions" is eligible for the 70/80 pension and related supplement.

We find that the 1985 Edgewater plan provides the plan administrator with discretion and, therefore, we shall apply the "arbitrary and capricious" standard of review to the decision of the plan administrator as established in *Firestone Tire and Rubber Co. v. Bruch*, _____ U.S. _____, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). The Supreme Court of the United States has defined the "arbitrary and capricious" standard of review.

> Under the "arbitrary and capricious" standard the scope of review is a narrow one. A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285, 95 S.Ct. 438, 441, 42 L.Ed.2d 447 (1974). Thus, the court should examine whether the plan administrator based his decision on relevant factors and whether he made a clear error of judgment concerning those factors.

The lower federal courts have also interpreted the "arbitrary and capricious" standard. The plan administrator should give a reasonable interpretation of the plan's rules. *Gordon v. ILWU-PMA Ben. Funds*, 616 F.2d 433 (9th Cir. 1980). *See also Rosen v. Hotel & Rest.*, 637 F.2d 592 (3d Cir. 1981). Unless the court can find the decision is not rational, the court must uphold the decision. *See Wolf v. National Shopmen Pension Fund*, 728 F.2d 182 (3d Cir. 1987). The trustee has a duty to develop reasonable evidence bearing on the plaintiff's claim. The court should examine whether the administrator based his decision upon substantial evidence. *See Lefebre v. Westinghouse Electric Corp.*, 747 F.2d 197, 204, 207 (4th Cir. 1984). The trial court is limited to evidence before the fiduciary at the time of the final decision. *See Denton v. 1st National Bank*, 765 F.2d 1295, 1304 (5th Cir. 1985). *See also Shaw v. NVF Co.*, 694 F.Supp. 1111, 1115 (D.Del. 1988).

Normally, the plan administrator or fiduciary of the plan is not a company official. However, in this case both Mr. Rosati and Mr. Kutzmark made fiduciary decisions[1]

[1] Mr. Rosati testified that he exercised fiduciary discretion over the management of the plan. When asked if somebody is eligible for a 70/80 pension, Mr. Rosati responded that he "would have input into that." *See* Rosati Deposition at 51. "In the case of a special pension application, then I would get involved and make a recommendation for a determination as to the disposition of the application along with other people who are on the pension board. I could certainly in my capacity make recommendations as to the plans themselves." *See* Rosati Deposition at 55.

when they denied benefits and, therefore, we consider them plan administrators or fiduciaries.[2] Although a conflict of interest exists, ERISA does not prohibit an employer from acting in accordance with its interest when not administering the plan or investing its assets. However, when it is acting as the plan administrator it has a fiduciary duty to act in the interest of the plan participants and beneficiaries and not on behalf of persons whose interests are adverse to the interests of the plan. *Sutton v. Weirton Steel Division of National Steel Corp.*, 567 F.Supp. 1184, 1201 (N.D.W.Va.) *aff'd* 724 F.2d 406 (4th Cir. 1983) *cert. denied* 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984). The plan administrator should balance the interests of the claimant against future claimants. *See Struble v. N.J. Brewery EMP Welfare Trust Fund*, 732 F.2d 325, 332 (3d Cir. 1984). *See also Haeffele v. Hercules, Inc.*, 839 F.2d 952 (3d Cir. 1988); *Eckersley v. WGAL TV, Inc.*, 831 F.2d 1204 (3d Cir. 1987); Section 404 of ERISA.[3]

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[2] A person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan, 29 U.S.C. §1002(21)(A) (1982).

[3] Section 404 of ERISA provides:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
> (A) for the exclusive purpose of;
> (i) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

29 U.S.C. §1104.

An award inconsistent with the plan's provisions would demonstrate that the employer acted arbitrarily and capriciously. *Hlinka v. Bethlehem Steel Corporation*, 863 F.2d 279, 285-286 (3d Cir. 1988). *See Hickman v. Tosco Corp.*, 840 F.2d 564 (8th Cir. 1988) (Administrator who strictly adheres to lawful terms of plan may not be found to have acted arbitrarily and capriciously). *See also Trenton v. Scott*, 832 F.2d 806 (3d Cir. 1987) (The fact that the fiduciary is the employer does not mean he has breached a duty); *Foltz v. U.S. News & World Report, Inc.*, 613 F.Supp. 634 (D.D.C. 1985) (Members of committee who gained by interpretation of plan to undervalue plan's worth were found to have breached fiduciary duty). If a benefit plan gives discretion to an administrator who is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion. *Bruch*, 103 L.Ed.2d at 95.

In some cases the courts have granted benefits where the employer, acting as the plan administrator, abused its discretion by following the company policy of denying benefits. In *Shaw v. NVF Co.*, 694 F.Supp. 1111 (D.Del. 1988) the court granted benefits because the employer had failed to articulate any justification that the denial was in the interest of the participants or beneficiaries. The court found that the company was motivated solely by its own self-interest. *Id.* at 1118. In *Frary v. Shorr Paper Products*, 494 F.Supp. 565, 569 (W.D.Ill. 1980), the court found that a policy of denying benefits to those who joined a competitor was an arbitrary decision and not in the interest of the participants.

In other cases, the courts have held that the employer, as the plan administrator, fulfilled his fiduciary duties when he reasonably applied the terms of the plan. In

Denton v. 1st National Bank, 765 F.2d 1295 (5th Cir. 1985), the court held that where the actuaries said a lump sum payment would impair the benefits of future retirees, the decision to deny benefits was proper. The court emphasized the rationality in the committee's action. *Id.* at 1305. The court also held that although a district court determines that a trustee's interpretation is not the correct one, that does not establish in itself arbitrary and capricious action, but is a factor in that determination. *Id.* at 1304.

This case is most similar to the Third Circuit's recent decision in *Hlinka v. Bethlehem Steel Corporation*, 863 F.2d 279 (3d Cir. 1988). In *Hlinka*, the plaintiff applied for a 70/80 benefit. Subsequently, the plan administrator determined Hlinka was not eligible for early retirement because the company needed Hlinka's unique technological expertise. After the pension review board upheld the administrator's decision, the trial court concluded that the plan administrator did not breach his fiduciary duty to the participants because he based his decision on the legitimate business reason provided by the company.

Asserting the facts of *Hlinka*, Edgewater contends that it did not act arbitrarily in denying the benefits because the company had no interest in retiring the plaintiffs. They considered the plaintiffs "contributors to the organization." Rosati Deposition at 36. In support, Mr. Rosati further testified that none of the four plaintiffs were going to be part of the impending force reductions and that he specifically assured Mr. Wagner and Mrs. Dallas that they would not be discharged.

We disagree with Edgewater's analysis of the facts and we distinguish this case from *Hlinka*. Mr. George Kutzmark, executive vice president of Edgewater,

testified that the top management people had decided that they were not going to have any mutual agreements because "the company cost structure could not stand it." Kutzmark Deposition at 20. Mr. Kutzmark also testified that Edgewater hired Mr. Rosati to institute this policy. "[W]e asked Mr. Rosati when he came on board to look over the whole salary structure and the benefits . . . we were preparing a program to reduce force and reduce benefits." Kutzmark Deposition at 10-11. It is clear that Edgewater had a company policy to deny the 70/80 benefit to secure the financial position of the company.

The record also evidences that Mr. Rosati and Mr. Kutzmark failed to follow ERISA's filing and notice requirements. Edgewater failed to file its plan amendments with the Department of Labor and failed to provide the plaintiffs a written denial of their claim, stating specific reasons for the denial even after Mr. Wagner and Mr. Berger demanded a written denial. They also failed to provide notice of the available appeal procedure to the plaintiffs.

The record further evidences that in presenting their decisions to the plaintiffs, neither Mr. Rosati nor Mr. Kutzmark made any attempt to apply the terms of section 2.6(c) of the plan. The Third Circuit has held that the determination as to whether an employee's retirement would be in the interest of the company is a subjective determination which can only be made by company management. *Hlinka*, 863 F.2d at 1116. In this case, the administrators failed to provide to the plaintiffs any legitimate business reasons why the company had an interest in retaining the employees or that the benefit would be detrimental to future participants.

The record evidences that Mr. Rosati and Mr. Kutzmark were motivated solely by their fiduciary duty to the company. This meant denying benefits to cut the losses of the company without regard for the terms of the plan. Mr. Berger testified, "I asked him (Rosati) what I would need to get a 70/80, if they were giving it, and could I apply for it, and he said they were not available." *See* Berger Deposition at 26. Mr. Berger further testified "I had asked him like to get that [the 70/80] and like to get the 330 a month additional that they were giving out prior to my retirement, and he said, no, they couldn't do it, couldn't afford it." *See* Berger Deposition at 28.

The closest Mr. Rosati came to satisfying his fiduciary responsibilities were his statements regarding the denial of benefits. At his deposition, Mr. Rosati stated that the four plaintiffs did not receive the $330 supplement after they retired because "they didn't meet any of the three circumstances [of Section 2.6]." *See* Rosati Deposition at 36, 43. He further contended that it was not in Edgewater's interest that they retire because "they were all, including Rose, employees who were thought could contribute to the organization and we had no interest in having them retire. We wanted them to continue to be employees." *See* Rosati Deposition at 36. Mr. Rosati also testified that he assured both Mrs. Dallas and Mr. Wagner that they were not going to be part of the impending force reduction. *See* Rosati Deposition at 38-39.

However, these statements are belied by Mr. Rosati's other statements. I discussed Mrs. Dallas' request for the 70/80 benefit with Mr. Kutzmark "and that we had concluded that we would not grant it, although she didn't ask, the reason is that we are not planning to do it

for anybody else." *See* Rosati Deposition at 77. We also find it important that Edgewater has not granted a 70/80 since November of 1986 when Mr. Rosati became the manager of industrial relations.

We also find that there may have existed a mutual interest in having the plaintiffs retire. We have previously decided that the plaintiffs retired because of the elimination of the special payment, the 70/80 supplement, and the impending force reduction. Thus, it was in the interest of the plaintiffs to retire. Mrs. Dallas testified that she conveyed to Mr. Rosati that it was in both her and Edgewater's mutual interest that she retire because, as director of employee benefits, she could not ethically counsel people that the special payment was not an accrued benefit. *See* Dallas Deposition at 51-52.

Mr. Wagner testified that Edgewater had eliminated all of the superintendents and replaced them with the newly created hot and cold superintendents. He also testified that the superintendents who had previously retired received the mutual benefit to get them to retire. *See* Wagner Deposition at 22-24. Additionally, Mr. Wagner testified that Mr. Rosati asked him what it would take to keep Mr. Wager at Edgewater. After Mr. Wager responded that he wanted the special payment and the 70/80 benefit, Mr. Rosati refused to grant the benefit.

We find that Mr. Wagner may have been the next superintendent in line to be eliminated. *See* Wagner Deposition at 18-19. We also find that it may have been in Edgewater's interest to have Mr. Wagner retire rather than grant him a 70/80 pension.

Mr. Berger testified that the week before the January 15, 1987 letter, Mr. Rosati had cut his salary and attempted to place in his record a letter stating that he

was unable to properly perform his job. *See* Berger Deposition at 22-24. Consequently, we find that it may have been in the mutual interest of the parties that the plaintiffs retire.

Regardless of whether mutual interest existed, we find that Mr. Rosati and Mr. Kutzmark failed to comply with ERISA's disclosure requirements, failed to apply the terms of the plan, and denied benefits solely to cut the costs of the company. We conclude that Mr. Rosati and Mr. Kutzmark denied benefits arbitrarily and capriciously and exercised an improper motive, therefore, breaching their fiduciary duties as plan administrators. *See* Restatement (Second) of Trusts §187 comment d (1959).[4] We shall grant the 70/80 benefits and $330 supplements to Mr. Berger, Mrs. Dallas, and Mr. Wagner.

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[4] Section 187 of the Restatement (Second) of Trusts provides:

> d. Factors in determining whether there is an abuse of discretion. In determining the question of whether the trustee is guilty of an abuse of discretion in exercising or failing to exercise a power, the following circumstances may be relevant: (1) the extent of the discretion conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or non-existence, the standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; (6) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.
>
> e. No abuse of discretion. If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment.

Order of the United States District Court for the Western District of Pennsylvania Dated July 25, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 87-2250

DONALD BERGER, BARBARA DALLAS, WILLIAM KIER, JR., ROSE SAXMAN and ROBERT WAGNER,

Plaintiffs,

v.

EDGEWATER STEEL COMPANY, a subsidiary of EDGEWATER CORPORATION, EDGEWATER CORPORATION and EDGEWATER STEEL COMPANY AS PLAN ADMINISTRATOR OF THE NON-CONTRIBUTORY PENSION PLAN FOR SALARIED EMPLOYEES,

Defendants.

ORDER

AND NOW, this 25th day of July, 1989, for the reasons set forth in the accompanying Memorandum Opinion,

IT IS HEREBY ORDERED that the motion to alter or amend this Court's memorandum opinion and order of June 13, 1989 filed on behalf of the plaintiffs, Barbara

Dallas, William Kier, Jr., and Robert Wagner is GRANTED as to plaintiffs Barbara Dallas and Robert Wagner and DENIED as to William Kier, Jr.

IT IS FURTHER ORDERED that the motion to alter or amend filed on behalf of the defendants, Edgewater Steel Corporation, *et al.*, is DENIED.

IT IS FURTHER ORDERED that the judgment order of June 13, 1989 is amended to provide that Mrs. Dallas and Mr. Wagner are entitled to 70/80 early retirement benefits and the $330 supplements.

GLENN E. MENCER
United States District Judge

cm: All parties of record. RVB

Opinion of the United States District Court for the Western District of Pennsylvania Dated June 13, 1990

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FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

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Defendants.

MEMORANDUM OPINION

The instant matter is before the Court on cross motions for summary judgment filed by the plaintiffs, Donald Berger, Barbara Dallas, William Kier, Jr., Rose Saxman and Robert Wagner and by the defendants, Edgewater Steel Company, Edgewater Corporation, and Edgewater Steel Company as Plan Administrator of the Non-Contributory Pension Plan for Salaried Employees.

Edgewater maintained a Non-Contributory Pension Plan for Salaried Employees ("Plan"). On January 15, 1987, John H. Kirkwood, President of Edgewater, announced that effective February 1, 1987 the defined benefit plan was being frozen and replaced by a defined contribution plan and that the "special payment" and the $330 per-month supplement associated with the "70-80 retirement" benefit would be eliminated. Prior to February 1, 1987, the five plaintiff-employees resigned their positions in order to be eligible for the eliminated benefits. In this action the plaintiffs are seeking reinstatement, back wages, front wages and the $330 supplement.

In Count I, the plaintiffs assert that the special payment was an "accrued benefit" and that Edgewater eliminated the special payment in violation of 29 U.S.C. §1054(g). They further argue that the issue is not whether they retired to accept the special payment but whether they were constructively discharged. The defendants contend that the special payment is not an accrued benefit and the plaintiffs, having received the special payment, do not have standing to assert Count I of their complaint.

We find that employees who take early retirement and elect to receive lump sum retirement benefits do not have standing to challenge changes in the retirement plan. *See Saporito v. Combustion Engineering, Inc.*, 843 F.2d 666, 671 (3d Cir. 1988). *See also Kuntz v. Reese*, 785 F.2d 1410 (9th Cir.) *cert. denied*, _____ U.S. _____, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986). *See also Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 708 (5th Cir. 1985); *Freeman v. Jacques Orthopedic and Joint Implant Surgery*, 721 F.2d 654, 655 (9th Cir. 1983); *Ogden v. Michigan Bell Telephone Company*, 657 F.Supp. 328, 332

(E.D.Mich. 1987). Here, the plaintiffs have received the special payment and, therefore, lack standing to assert Count I of their complaint. We will grant summary judgment in favor of the defendants as to Count I.

In Count II, the plaintiffs assert that the amendments to the plan and Mr. Kirkwood's letter announcing the amendments violated Section 510 of ERISA, 29 U.S.C. §1140. Section 510 provides that it is unlawful for any person to commit certain discriminatory acts which interfere with an employee's attainment of an ERISA benefit. The plaintiffs assert that Edgewater's impending illegal reduction in benefits constituted a constructive discharge which prevented employees from attaining their benefits.

Likewise, we conclude that in Count II the plaintiffs lack standing to assert a claim for the special payment which they have already received. Therefore, we shall grant summary judgment in favor of the defendants as to Count II of the plaintiffs' complaint.

In Count III, the plaintiffs (excluding Rose Saxman) assert that defendants interfered with the plaintiffs' attainment of an unreduced pension and a $330 supplement associated with the 70/80 retirement and that the defendants arbitrarily denied the benefits in violation of ERISA. The plaintiffs claim eligibility under Section 2.6(c) of the Plan. Section 2.6(c) provides for a "mutual pension" when the company considers the employee's retirement in its interest.

Defendants contend that the plaintiffs failed to exhaust their administrative remedies. *See Gavalik v. Continental Can Company,* 812 F.2d 834, 849-850 (3d Cir. 1987). *See also Zipf v. American Telephone and Telegraph,* 799 F.2d 889, 891 (3d Cir. 1986). Defendants

assert that Mr. Kier never applied for the 70/80 retirement and plaintiffs Dallas, Berger, and Wagner admit that they failed to appeal the initial denial.

We find that claims to establish or enforce rights to benefits under 29 U.S.C. §1132(a) that are independent of claims based on violation of the substantive provisions of ERISA are subject to arbitration . . . while claims of statutory violations can be brought in a federal court notwithstanding an agreement to arbitrate. *Zipf*, 799 F.2d at 892 (quoting *Barrowclough*) (citations omitted). Claims under Section 510 of ERISA may be brought in the federal courts. *Gavalik*, 812 F.2d at 850. Since we find that Section 510 entitles the plaintiffs to assert their rights in federal court through the enforcement provisions of 29 U.S.C. §1132(a) we will exercise jurisdiction over Count III of the plaintiffs' complaint.

Relying on *Gavalik v. Continental Can Company*, 812 F.2d 834 (3d Cir. 1987), the defendants assert that the plaintiffs have failed to assert the element of intent for a prima facie case under Section 510 of ERISA. They also assert that since the special payment was not an accrued benefit, the employees cannot recover under section 510. *See West v. Greyhound Corp.*, 813 F.2d 951 (9th Cir. 1987). They state that the *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888 (3d Cir. 1984) case is limited to Title VII cases and that a retirement incentive of this type cannot constitute a constructive discharge, unless the retiring employee can show that he would have been fired if he had not accepted the retirement incentive. *See Henn v. National Geographic Society*, 819 F.2d 824, 830 (7th Cir.), *cert. denied*, _____ U.S. _____, 108 S.Ct. 454 (1987).

The plaintiffs respond that no finding of specific intent on the part of the employer to bring about a discharge is required for the application of the constructive discharge doctrine in a Title VII employment discrimination case. The court need merely find that the employer knowingly permitted conditions of discrimination in employment so intolerable that reasonable person subject to them would resign. *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888 (3d Cir. 1984). *See Levendos v. Stern Entertainment, Inc.*, 860 F.2d 1227, 1231 (3d Cir. 1988). The plaintiffs conclude that they have asserted a prima facie case of discrimination by demonstrating that Edgewater had a desire to defeat pension eligibility by eliminating the accrued special payment.

We find that Congress, through Section 510 of ERISA, 29 U.S.C. §1140, intended to prevent employers from discharging, harsassing, or discriminating against employees in order to prevent them from attaining their benefits. *See West v. Butler*, 621 F.2d 240 (6th Cir. 1980). *See also Aranson v. Servus Rubber Division of Chromalloy*, 730 F.2d 12 (1st Cir. 1984), *cert. denied*, 469 U.S. 1017 (1984); *Phillips v. Amoco Oil Co.*, 614 F.Supp. 694 (D.Ala. 1985), *aff'd* 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 1893 (1987); *Zipf v. American Telephone and Telegraph*, 799 F.2d 889, 891 (3d Cir. 1986); *Donohue v. Custom Management Corp.*, 634 F.Supp. 1190, 1197 (W.D.Pa. 1986).

Section 510 clearly indicates that the doctrine of constructive discharge is applicable. *See Lojek v. Thomas*, 716 F.2d 675 (9th Cir. 1983). What distinguishes early retirement from discharge is the power of the employee to choose to keep working. Thus, the plaintiff must show that the retirement was involuntary to establish a constructive discharge. The

"voluntariness" question turns on such things as: "did the person receive information about what would happen in response to the choice? was the choice free from fraud or other misconduct? did the person have an opportunity to stay? A very short period to make a complex choice may show that the person could not digest the information necessary to the decision." *Henn*, 819 F.2d at 828-829. It is an objective standard focusing on whether the "working conditions were so difficult or unpleasant that a reasonable person in the employee's shoes could have felt compelled to resign." *Lojek*, 716 F.2d at 681. *See Downey v. Southern Natural Gas Co.*, 649 F.2d 3012, 305 (5th Cir. 1981).

The appropriate question in early retirement cases is whether the existing conditions violate the ADEA. *Id.* at 829. Thus, we fashion the rule that if the existing conditions violate ERISA, then the plaintiff's early retirement may be probative of a constructive discharge. Although we find that Edgewater's amendment of the plan to exclude the special payment violated 29 U.S.C. §1054(g) of ERISA,[1] we determine that constuctive discharge is a question of fact directed at the voluntariness of the employee's choice. *See Levendos v. Stern Entertainment, Inc.*, 860 F.2d at 1232-1233. *See also Paolillo v. Dresser Indus. Inc.*, 865 F.2d 37 (2d Cir. 1989).

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[1] In our memorandum opinion of February 11, 1989 in this case, we established that the special payment constituted an accrued benefit. 29 U.S.C. §1054(g) of ERISA provides:

> The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title.

We, therefore, determine that the elimination of the special payment was a violation of 29 U.S.C. §1054(g).

We shall examine the voluntariness of the plaintiffs' choice. One court has described an involuntary choice as the Vito Corleone choice—"an offer they can't refuse." Here, Edgewater gave the plaintiffs a chance to retire and collect substantial sums of money (the amounts differ among the plaintiffs) or continue working and lose the special payment. Barbara Dallas, director of employee benefits, testified, "I was forced to retire because they eliminated the special payment, and also I was counseling employees, and I felt that they were illegally eliminating the special payment and violating the ERISA rules in eliminating an accrued benefit from employees." Dallas Deposition at 30. Mr. Kier also related that he retired to receive the special payment. Kier Deposition at 16.

Rose Saxman testified, "I think it's an involuntary thing. I went because I was—because of the special payment, okay. I would have lost that, and I felt that, you know, that it was coming to me. Saxman Deposition at 18. Mr. Berger testified that he retired "primarily because of that letter being issued. They were taking benefits away, which I had earned." Berger Deposition at 22. Accordingly, we conclude that the plaintiffs have shown by a preponderance of the evidence that Edgewater constructively discharged the plaintiffs by amending the special payment provision of the benefit plan.

However, to prevail under Section 510, the plaintiffs must establish that Edgewater had the "specific intent" to interfere with the attainment of pension eligibility, regardless of whether the interference is successful or the participant would actually have received the benefits. *See Gavalik*, 812 F.2d at 852, 856. *See also Zipf*, 799

F.2d at 893; *Vogel v. Honeywell, Inc.*, C.A. No. 88-4612 (E.D.Pa. 1989); *Titsch v. Reliance Group, Inc.*, 548 F.Supp. 983, 985 (S.D.N.Y. 1982).

An employee in a Section 510 suit needs to establish that at the time of the alleged violation he or she had the potential of receiving benefits. Otherwise, there can be no credible claim that the employer's discharge or harassment decision was motivated by a desire to prevent the employee from receiving his or her pension. *Zipf*, 799 F.2d at 893. Proof of incidental loss of benefits as a result of a termination will not constitute a violation of Section 510. *Gavalik*, 812 F.2d at 852. Whether or not the plaintiff's rights were vested within the meaning of ERISA at the time of his discharge is irrelevant to this cause of action. *Calhoun v. Falstaff Brewing Corp.*, 478 F.Supp. 357, 360 (E.D. Mo. 1979). An employee whose pension rights were vested cannot maintain that the defendant fired him in order to prevent plaintiff from obtaining vested pension rights. *See Clark v. Resistoflex C.-Div. of Unidynamics*, 854 F2d 762 (5th Cir. 1988). *See also Corum v. Farm Credit Services*, 628 F.Supp. 707, 717 (D.Minn. 1986).

Where the plaintiff's case does consist of direct "smoking gun" evidence that the employer acted with discriminatory motivation, the shifting burdens mechanism is inapplicable and the court should analyze the proof as in any other civil case. *Gavalik*, 812 F.2d 852-853. Ordinarily, the record fails to provide direct evidence of specific intent. Hence, the Third Circuit has adopted the shifting burden of proof analysis found in Title VII cases to establish specific intent in Section 510 cases. As in Title VII cases, in a Section 510 action the employee bears the burden of making out a prima facie case of discrimination.

To establish a prima facie case the plaintiff must demonstrate: 1) plaintiff had the opportunity to attain rights in a covered benefit plan; 2) the plaintiff was qualified for his position; 3) the circumstances, such as the amount of time before vesting and the amount of benefit, surrounding his discharge are sufficient to give rise to an inference of discrimination based upon an intent to interfere with the attainment of a benefit. *Dister v. Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988).

Once the employee establishes a prima facie case by a preponderance of the evidence, the burden shifts to the defendant to articulate legitimate, nondiscriminatory reasons for the plaintiff's rejection. *Burdine*, 450 U.S. at 255, 67 L.Ed. 2d at 216. The presumption thereby rebutted, the plaintiff retains the burden of persuasion. The plaintiff may meet this burden "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256, 67 L.Ed.2d at 217; *See McDonnell Douglas*, 411 U.S. at 804-805; *Chipollini*, 814 F.2d at 898. At this stage the "factual inquiry proceeds to a new level of specificity." *Id.* at 255.

The court must decide whether inconsistencies and implausibilities in the evidence could support an inference that the employer did not act for non-discriminatory reasons. *Chipollini*, 814 F.2d at 900 (citing *Graham v. F.V. Leopold Co.*, 779 F.2d 170, 172-173 (3rd Cir. 1985). On a motion for summary judgment the Court must determine whether the proffered reasons are legitimate or subject to genuine factual dispute.

We find that the plaintiff has alleged a prima facie case. 1) The plaintiffs had the opportunity to attain benefits in the 70/80 pension benefit plan and the $330 supplement; 2) The plaintiffs had all worked for Edgewater for very extended periods of time. The defendants have provided evidence that all the employees were contributors to the organization and that Edgewater had no interest in retiring them. Rosati Deposition at 36; 3) The plaintiffs had worked for Edgewater for substantial periods of time and within a short period of time would have been eligible for the 70/80 benefit and the supplement. Despite wide scale reductions, the plaintiffs had yet to be laid-off or terminated.

In rebuttal, the defendants assert that from 1982 until 1987 Edgewater lost an average of approximately $2,900,000 per-year and as a result Edgewater was in poor financial condition. Mr. Rosati testified that he recommended to John Kirkwood, Edgewater's President, and George Kutzmark, Edgewater's Executive Vice President, that the special payment be eliminated for financial reasons. He stated, "Economics. The company was struggling and we needed to save money . . . We were advised that it [the special payment] was not [an accrued benefit.]" Rosati Deposition at 15-16. On page 19 of his deposition, Mr. Rosati reconfirmed that his attorney advised him that the special payment was not an accrued benefit.

In this case, we ponder whether the financial position of Edgewater is a legitimate, nondiscriminatory reason for eliminating benefits. We find it troublesome because ordinarily the employer must articulate a legitimate, nondiscriminatory reason why he fired the employee. In the case of constructive discharge it is especially difficult

for the employer to articulate a legitimate, nondiscriminatory reason because constructive discharge is a question of the employee's voluntariness where in ordinary termination cases it is a question of the employer's intent.

The Third Circuit has provided a smidgen of assistance: -

> Section 510's essential purpose is to prevent employers from intentionally interfering with impending pension eligibility whether motivated by malice toward the particular employee(s) or by a general concern for the economic stability of the company. Incidental loss of pension benefits . . . as the result of a legitimate business practice will not constitute a violation of ERISA. Bad faith, however, is not an element of a section 510 claim."

Gavalik, 812 F.2d 857 n. 39.

We find that Edgewater, by asserting that they believed, after consulting with counsel, that the special payment was an unaccrued benefit and that it could be legally eliminated, has articulated a legitimate, nondiscriminatory reason for eliminating the special payment and thereby constructively discharging the employees.

Edgewater having articulated a legitimate reason for amending the plan, plaintiffs' burden at trial would be to prove by a preponderance of evidence that the reasons advanced are simply pretext for discrimination. The federal courts have provided several standards for summary judgment. The Third Circuit states:

> Therefore, to meet its burden on summary judgment, the defendant employer must show that the plaintiff will be unable to introduce either direct

> evidence of a purpose to discriminate, or indirect evidence of that purpose by showing that the proffered reason is subject to factual dispute.

Chipollini, 814 F.2d at 899.

Section 510 protects employees from conduct designed to deprive them of rights created under employee benefit plans. The distinction lies between a legitimate business decision and reasons manufactured to avoid liability. The Court must see whether facts exist from which a reasonable jury could conclude that the employer's business decision was so lacking in merit as to call into question its genuineness. *See Dister v. Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988).

An employer's awareness of the loss of the employee's benefits add weight to an employee's claim of interference. However, neither a lost opportunity to accrue increased pension benefits caused by employer action nor an employer's understanding of that action's effect on an employee's pension benefits can, by itself, support a finding of the specific intent required by Section 510. *See Vogel v. Honeywell, Inc.*, C.A. No. 88-4612 (E.D.Pa. 1989). *See also Titsch v. Reliance Group, Inc.*, 548 F.Supp. at 985; *Clark v. Resistoflex Co.-Div. of Unidynamics*, 854 F.2d 762, 771 (5th Cir. 1988). Section 510 requires no more than proof that the desire to defeat pension eligibility is a "determinative factor" in the challenged conduct. *Gavalik*, 812 F.2d at 860. *See Nixon v. Celotex Corp.*, 693 F.Supp. 547, 555 (W.D.Mich. 1988) (Must establish more than the mere fact that the termination of employment meant monetary savings to the defendant. Must be shown a causal link between pension benefit and adverse employment decision.) *See also Ferrante v. Int. Salt Co.*, 687 F.Supp. 309, 314 (E.D.Mich. 1988) (specific intent to engage in proscribed

activity.); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 374 (D.N.J. 1987); *Johnson v. United Airlines*, 680 F.Supp. 1425, 1432-1433 (D.Hawaii 1987).

To prevail in this case, the plaintiffs must establish that it was a plan of Edgewater to eliminate the special payment and the $330 supplement so that the plaintiffs would resign and the granting of the 70/80 pension would become a discretionary choice instead of a mandatory benefit, as it would have been if Edgewater had laid them off or had a forced reduction.

The testimony of Mr. George Kutzmark, executive vice president of Edgewater, is particularly revealing. When asked whether the management of the company had an understanding that they were not going to have any mutual agreements for people who receive the 70/80's, Mr. Kutzmark responded, "Yes. That was our purpose of this [the meetings]. We did not want to provide 70/80's in the future. The company cost structure would not stand it." Kutzmark Deposition at 20. Kutzmark further stated, "We went at the salary costs which I felt were extremely high for a company with a loss position that Edgewater was experiencing and we asked Mr. Rosati when he came on board to look over the whole salary structure and the benefits ... we were preparing a program to reduce force and reduce benefits." Kutzmark Deposition at 10-11. When asked if he knew that people would consider retiring, if they had to lose the special payment, Kutzmark responded, "I didn't know. I was concerned that there might be some but I didn't know." Kutzmark Deposition at 30.

The testimony of Joseph Rosati, manager of industrial relations, is convincing that Edgewater did not intend to eliminate the 70/80 pension by eliminating the special payment. When asked if he felt the January 15, 1987

letter eliminating benefits would cause some of the employees to retire, Mr. Rosati answered, "I thought there was a possibility, yes." When asked if its purpose was to induce some of the employees to retire, Kutzmark answered "not at all." Rosati deposition at 31. Mr. Rosati further testified that it was not in the interest of the company to have the plaintiffs retire. He stated, "They were all, including Rose, employees who were thought could contribute to the organization and we had no interest in having them retire. We wanted them to continue to be employees." Rosati Deposition at 36. Mr. Rosati further testified that the plaintiffs were not going to be in the forced reduction and that two of them were told they would not be part of the forced reduction. Rosati Deposition at 38-39. We conclude that the plaintiffs have failed to present evidence that the proferred reason is subject to factual dispute or that the plaintiffs could show that Edgewater intended to interfere with the plaintiffs attainment of the 70/80 benefit and supplement by eliminating the special payment.

In Count III of their complaint the plaintiffs have defectively plead a cause of action under section 502(a), 29 U.S.C. §1132(a). The plaintiffs should have alleged that their constructive discharge entitled the plaintiffs to a mandatory 70/80 pension under the terms of the plan or, in the alternative, that the plan administrator arbitrarily denied their 70/80 pension. However, we realize that the plaintiffs have eliminated Rose Saxman from Count III because she was ineligible for the 70/80 benefit. We also find that the plaintiffs through the other parts of their complaint have provided notice to the defendants and the defendants have recognized that a section 502(a) cause of action exists.

We find that employee must have met the eligibility requirements and thus have had an accrued benefit to recover a 70/80 benefit under ERISA. *See Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279 (3d Cir. 1988). *See also Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1527 (3d Cir. 1988). We find that Mr. Berger, who had thirty years of service and was fifty-six years of age when he retired, was the only employee eligible for the 70/80 benefit.

Plaintiffs must also exhaust administrative remedies to assert a claim under 29 U.S.C. §1132(a). *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182 (3d Cir. 1984). The court-created exceptions to the general exhaustion requirement: 1) a showing of irreparable harm which is either job related or will affect the exercise of employee rights under ERISA; 2) a showing that it would be futile to require the plaintiff to internally exhaust remedies; 3) the plaintiff has been wrongfully denied meaningful access to internal procedures. However, the plaintiff must attempt to comply with the application and review procedures found in the plan. *See Lucas v. Warner & Swasey Co.*, 475 F.Supp. 1071, 1074 (E.D.Pa. 1979). The futility requirement is satisfied if the administrator discloses that its position has become fixed and that the employer is unwilling to provide benefits. *See Clayton v. Automobile Workers*, 451 U.S. 679, 689-693, 1010 S.Ct. 2088, 2095-97, 68 L.Ed.2d 538 (1981). *See also Goclowski v. Penn Cent. Transp. Co.*, 571 F.2d 747 (3d Cir. 1977).

Section 503 of ERISA, 29 U.S.C. §1133, also requires that every employee benefit plan afford a reasonable opportunity to any participant whose claim for benefits has been denied to a full and fair review by the fiduciary of the plan. *See Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1225 (11th Cir. 1985). Section 503 also

provides that the employee must receive notice setting forth reasons for denial. If he does not receive notice then he can proceed to the review stage. The exhaustion requirement should be strictly enforced except where futile. *See also Chambers v. European American Bank & Trust Co.*, 601 F.Supp. 630 (E.D.N.Y. 1985).

Mr. Berger testified that he asked Mr. Rosati for an official rejection of his claim for a 70/80 but Rosati declined to furnish him one. Berger Deposition at 32. We conclude that Mr. Berger attempted to exhaust his administrative remedy but found that it was futile to pursue any internal appeal.

Section 2.6 of the 1985 employee benefit plan provides:

> *70/80 Retirement*
>
> Any participant who shall have had at least 15 years of Continuous Service and
>
> (i) shall have attained the age of 55 years and whose combined age and years of Continuous Service shall equal 70 or more, or
> (ii) whose combined age and years of Continuous Service shall equal 80 or more, and
>
> (a) whose Continuous Service is broken by reason of permanent shutdown of the plant, department or subdivision thereof or by reason of a layoff or physical disability, or
>
> (c) who considers that it would be in his interest to retire, and the Company considers that such retirement would likewise be in its interest and it approved an application for retirement under mutually satisfactory conditions,
>
> shall be eligible to retire and shall upon his retirement (hereinafter "70/80 retirement") be eligible for a special payment and a regular pension.

See Defendants' Exhibit A.

In *Firestone Tire and Rubber Co. v. Bruch*, _____ U.S. _____, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), the United States Supreme Court held that where the plan does not provide the plan administrator with discretion, the district court should review decisions of the plan administrator *de novo*. As previously decided, we find that Edgewater constructively discharged Mr. Berger which entitles him to treatment under section 2.6(a) of the plan as a laid-off employee. We also find that section 2.6(a) of the plan does not provide the plan administrator with discretion. We, therefore, conclude that the decision to deny Mr. Berger a 70/80 pension and the $330 supplement violated the terms of the pension plan and of ERISA. We shall grant Mr. Berger's motion for summary judgment and grant him his 70/80 pension and its $330 supplement.

In Count IV the plaintiffs assert that they were improperly denied termination pay. Plaintiffs contend that Edgewater's unwritten and unpublished termination pay policy violated the disclosure provisions of ERISA in such a manner as to entitle the plaintiffs to a substantive remedy. As a result of the non-disclosure, the plaintiffs believed that they were entitled to termination pay, regardless of whether Edgewater laid them off or eliminated their positions. *See Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984). Accordingly, Edgewater arbitrarily denied them termination pay.

In any event, the plaintiffs urge that their constructive discharges constituted a forced retirement entitling them to termination pay. Plaintiffs also argue that the termination pay eligibility requirements are unlawful under the Age Discrimination in Employment Act ("ADEA") as decided in *E.E.O.C. v. Westinghouse*

Electric Corp., 48 F.E.P. 734 (3d Cir. 1988) because older pension-eligible employees must receive termination pay just the same as younger pension-ineligible employees. *See Betts v. Hamilton City Board of Mental Retardation*, 848 F.2d 692 (6th Cir. 1988). *See also E.E.O.C. v. Bordens, Inc.*, 724 F.2d 1390 (9th Cir. 1984). Accordingly, the plaintiffs urge that they are entitled to twelve weeks salary plus interest under the termination pay policy.

Defendants assert that ERISA provides no substantive remedy for violation of its procedural requirements, unless the defendant's conduct rises to the level of a breach of fiduciary duty by also concealing the terms of the plan and disregarding its terms. The defendant argues that these facts are absent in this case. *See Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984). The defendants also contend that even if Edgewater violated Section 1021 of ERISA, by failing to properly disclose the terms of the termination pay policy, the plaintiffs are not entitled to termination pay because they were ineligible.

Ordinarily, a claimant who suffers because of a fiduciary's failure to comply with ERISA's procedural requirements is entitled to no substantive remedy. *Wolfe v. J.C. Penney Co.*, 710 F.2d 388, 393 (7th Cir. 1983). However, in certain circumstances, the quantity of defendants' procedural violations may work a substantive harm. The court must consider procedural violations to determine whether a decision is arbitrary or capricious. The plan's administrative practice is probative of whether a decision to deny benefits was infected with an objectionable scheme. *Blau*, 748 F.2d at 1354.

The plaintiffs evidence consists of speculative testimony that it was company policy to extend severance pay to retirees. Mr. Berger testified, "I heard rumors but nothing I can substantiate [about persons who got both termination pay and an immediate pension]." Berger Deposition at 34-35. *See* Kier Deposition at 27. Mr. Wagner testified, "Al Malagreca got termination pay and he retired . . . somebody told me." Wagner Deposition at 28. Mr. Berger and Mrs. Saxman both testified that Paul Witkovitz received a pension and severance pay. Mrs. Saxman testified that it was common knowledge that when you retired you received severance pay. Saxman Deposition at 19, 22. Mrs. Saxman testified that Vince Konesci, William King, James Booth, and James Lynch received both termination pay and an immediate pension.

However, Barbara Dallas, director of employee benefits, testified that she did not know anyone who retired from Edgewater and was eligible for an immediate pension who received termination pay. Dallas Deposition at 65. Mr. Rosati also testified that "Barbara Dallas told me [Rosati] very specifically that the termination pay was paid to a salaried employee who was terminated for reasons other than cause and who did not meet the requirements for an immediate pension. Rosati Deposition at 65. We find that the plaintiffs have failed to present concrete evidence that Edgewater ever distributed termination pay to employees who received an immediate pension. Consequently, we determine that although Edgewater failed to comply with the disclosure provisions of ERISA, Edgewater did not breach its fiduciary duties by not granting the plaintiffs termination pay.

We also find that although the pension plan provides that a pension shall be reduced by any severance allowance provided by the company, we conclude that this provision fails to provide that an employee receive termination pay and an immediate pension.

Likewise, although we agree that the termination pay plan may have violated ADEA, we fail to find an ADEA claim in the plaintiffs' complaint and are unwilling to interpose that statutory scheme in this case. We, therefore, conclude that the plaintiffs are not entitled to severance pay under ERISA. We shall grant summary judgment in favor of the defendants and against all of the plaintiffs except Donald Berger. We shall grant summary judgment in favor of Donald Berger for a claim under section 502(a) and award him the 70/80 benefit and supplement.

Order of the United States District Court for the Western District of Pennsylvania Dated June 13, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 87-2250

DONALD BERGER, BARBARA DALLAS, WILLIAM KIER, JR., ROSE SAXMAN, and ROBERT WAGNER,

Plaintiffs,

v.

EDGEWATER STEEL COMPANY, a subsidiary of EDGEWATER CORPORATION, EDGEWATER CORPORATION, and EDGEWATER STEEL COMPANY AS PLAN ADMINISTRATOR OF THE NON-CONTRIBUTORY PENSION PLAN FOR SALARIED EMPLOYEES,

Defendants.

ORDER

AND NOW, this 13th day of June, 1989, for the reasons set forth in the accompanying Memorandum Opinion,

IT IS HEREBY ORDERED that:

(1) The Defendants' Motion for Summary Judgment is GRANTED in part and DENIED in part.

(2) The Plaintiffs' Motion for Summary Judgment is GRANTED in part and DENIED in part.

(3) Judgment is entered in favor of the Defendants, Edgewater Steel Company, Edgewater Corporation, and Edgewater Steel Company as Plan Administrator of the Non-Contributory Pension Plan for Salaried Employees and against the Plaintiffs, Barbara Dallas, William Kier, Jr., Rose Saxman, and Robert Wagner.

(4) Judgment is entered in favor of the Plaintiff, Donald Berger, for the 70/80 benefit and the $330 supplement and against the Defendants.

GLENN E. MENCER
United States District Judge

cm: All parties of record. RVB

Opinion of the United States District Court for the Western District of Pennsylvania Dated February 11, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 87-2250

DONALD BERGER, BARBARA DALLAS, WILLIAM KIER, JR., ROSE SAXMAN and ROBERT WAGNER,

Plaintiff,

v.

EDGEWATER STEEL COMPANY, a subsidiary of Edgewater Corporation, EDGEWATER CORPORATION, EDGEWATER STEEL COMPANY, as Plan Administrator of the Non-contributory Pension Plan for Salaried Employees, and JOHN H. KIRKWOOD, an Individual,

Defendants.

MEMORANDUM

Effective February 1, 1987, Defendant, Edgewater Steel Company (Edgewater) changed its pension plan for salaried employees by eliminating two provisions that had previously been provided under that plan. Edgewater maintained a Non-contributory Pension Plan for Salaried Employees (Plan). The changes made to the Plan was the elimination of two provisions: the "special payment" and the $330 per month increase associated with a "70-80 retirement".

Defendants have filed a Motion to Dismiss all but one count of Plaintiffs' Complaint.[1]

The changes eliminating the special payment and the $330 per month increase associated with the 70-80 retirement were announced to all salaried employees by letter of January 15, 1987 from John H. Kirkwood, President of Edgewater. After receipt of Mr. Kirkwood's letter, all of the Plaintiffs retired before February 1, 1987.

Plaintiffs allege in Count I of their Complaint that the special payment was an "accrued benefit" that could not be decreased or eliminated under §1054(g) of Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1054(g).

Any consideration of the validity of a change to an ERISA plan must start from the premise that "[i]t is not *per se* unlawful to modify prospective pension ... benefits, provided that no ERISA or other labor law is violated in the change." *Sutton v. Weirton Steel Division of National Steel Corp.*, 567 F. Supp. 1184, 1192 (N.D. W.Va. 1983), *aff'd* 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984).

In determining what constitutes an accrued benefit for purposes of §1054(g), courts must "look first at the plain language of the statute." *Bencivenga v. Western Pennsylvania Teamsters*, 763 F.2d 574, 577 (3d Cir. 1985). To be "accrued" under the statutory definition, a benefit must be "annual" and must start at "normal retirement age."

It is true that the Special Payment is not technically part of the expression of the pension benefit that will be payable over the life of the retired participant; that type

[1] Defendants do not move to dismiss Count IV, relating to severance pay.

of expression of benefits occurs only on connection with the "Regular Pension." On the other hand, the Special Payment is, where applicable, very much a part of the benefit pay-out description in that it is in fact the pay-out for the first three months of retirement. The Special Payment is not a gratuitous bonus payment voluntarily added in by the employer as a token of appreciation. Rather, this payment constitutes the pension benefits for the first three months of retirement and is as much a bargained-for benefit as is the Regular Pension. Consequently, we conclude that this feature of the Plan must be regarded as an accrued benefit.

See: Shaw v. International Association of Machinists & Aerospace Workers Pension Plan, 563 F. Supp. 653 (C.D. Cal. 1983), *aff'd*, 750 F.2d 1458 (9th Cir. 1985), *cert. denied*, 471 U.S. 1137 (1987).

Count II of Plaintiffs' Complaint alleges that the elimination of the special payment, and Mr. Kirkwood's letter announcing it, violated §510 of ERISA, 29 U.S.C. §1140 (hereinafter referred to by its United States Code citation as section 1140). Count II alleges that the elimination of the $330 per month increase associated with 70-80 retirement was a violation of §1140.

Section 1140 provides, in pertinent part, as follows:

> *Interference With Protected Rights.*
>
> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . [or] this title . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . [or] this title . . .

Although we make no endeavor at this time to determine if the Plaintiffs' claim at Count II has merit, we recognize that Plaintiffs here allege that their employer has forced them to resign in order to avoid the elimination of an accrued benefit. Since Defendants' main assertion as to why Count II should be dismissed is based on the contention that benefits eliminated were not accrued, a contention not now accepted by this Court, we will not dismiss Count II.

As to Count III, the Plaintiffs in the instant case are attacking the means by which they were allegedly compelled to resign. They are making claims allegedly asserting rights guaranteed by ERISA and not claims seeking to enforce the terms of a pension plan. Accordingly, the requirement that the remedies provided under the applicable plan must be exhausted prior to the commencement of an action in a Federal District Court does not apply. *See: Zipf v. American Telephone and Telegraph Co.*, 799 F.2d 889 (3d Cir. 1986).

Counts V through VIII of Plaintiffs' Complaint are pendant state claims for misrepresentation against Edgewater and its President, Mr. Kirkwood. These are the only claims asserted against Mr. Kirkwood individually. These claims are based entirely upon Mr. Kirkwood's letter of January 15, 1987. Plaintiffs allege in Counts V and VI that that letter "misrepresented to the Plaintiffs that their Special Payments could be taken away from them if they did not retire before February 1, 1987 and that that statement "can only be viewed as an intentional misrepresentation". In Counts VII and VIII, Plaintiffs allege that this same letter was a negligent misrepresentation.

Assuming that Mr. Kirkwood's letter can be construed as a misrepresentation actionable under Pennsylvania law, Plaintiffs' claims based upon it are nonetheless barred by ERISA's broad pre-emption provision.

In *Pilot Life Ins. Co. v. Dedeaux*, 481 _____ U.S. _____, 95 L.Ed.2d 39 (1987), the Supreme Court once again indicated that ERISA's pre-emptive language is to be read broadly.

In *Ogden v. Michigan Bell Telephone Co.*, 571 F. Supp. 520 (E.D. Mich. 1983), the court held that the plaintiff's claim of common law fraud based upon alleged false statements concerning the future availability of pension benefits was pre-empted. The court relied upon Congress' "intent to occupy the field" and upon the fact that ERISA provided a remedy for the alleged fraud. 571 F. Supp. at 523. If defendants did fraudulently misrepresent the nature of benefits available in the future, the court concluded, they violated their fiduciary duty under ERISA and their ERISA-imposed obligation to release pertinent information concerning the plan.

Here, Defendants' alleged misrepresentation concerns what Defendants assert it may do lawfully under ERISA. Defendants here did exactly what they said they would do. If Mr. Kirkwood's letter can be construed as a misrepresentation, it is a misrepresentation regarding what Defendants contended it was entitled to do under ERISA. The very question of whether a misrepresentation occurred thus turns upon whether ERISA was violated by changing the Plan.

We conclude that Plaintiffs' state misrepresentation claims[2] set forth in Counts V through VIII of their Complaint are pre-empted by the provisions of the Employee Retirement Income Security act of 1974, 29 U.S.C. §1001 et seq. (ERISA). *See, Pilot Life Insurance Company v. Dedeaux*, 481 _____ U.S. _____, 95 L.Ed.2d 39, 109 S. Ct. _____ (1987).

An appropriate order will be filed.

[2] Plaintiffs invite our attention to the case of *Greenblatt v. The Budd Company*, 666 F. Supp. 735 (E.D. Pa. 1987). In *Greenblatt* it was held that a state law misrepresentation claim was not pre-empted by ERISA. However, we distinguish the fact situation here from that in *Greenblatt* and must conclude that in the instant case the Defendants did exactly what they said they would do, unlike the defendants in *Greenblatt* who made promises that were not honored, and the employer's letter was issued as an alleged improper administration of the plan and if plaintiff's position is determined to be correct in this suit, then remedies are surely available under the provisions of ERISA.

Order of the United States District Court for the Western District of Pennsylvania Dated February 11, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 87-2250

DONALD BERGER, BARBARA DALLAS, WILLIAM KIER, JR., ROSE SAXMAN and ROBERT WAGNER,

Plaintiffs,

v.

EDGEWATER STEEL COMPANY, a subsidiary of Edgewater Corporation, EDGEWATER CORPORATION, EDGEWATER STEEL COMPANY, as Plan Administrator of the Non-contributory Pension Plan for Salaried Employees, and JOHN H. KIRKWOOD, an Individual,

Defendants.

ORDER

AND NOW, this 11th day of February, 1988, for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY ORDERED that:

(1) Defendants' Motion to Dismiss is GRANTED in PART and DENIED in PART;

(2) Counts V, VI, VII and VIII of Plaintiffs' Complaint are DISMISSED; and

(3) Defendants shall file an Answer or other responsive pleading to Plaintiffs' Complaint, now consisting of Counts I, II, III, and IV, on or before March 4, 1988.

GLENN E. MENCER
United States District Judge

CM: All parties of record. cc